IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES E. STILTNER,
Petitioner,

v.

BERETTA U.S.A. CORP.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a closely divided (8-5) *en banc* decision, the court below erred in holding that the termination of a participant's existing health benefits—which his employer had no contractual obligation to continue—does not constitute unlawful discrimination under § 510 of ERISA, even when the termination of such benefits is motivated by an improper intent to retaliate for the exercise of ERISA-protected rights.

PARTIES

The parties before the United States Court of Appeals for the Fourth Circuit were Petitioner, James E. Stiltner, and Beretta U.S.A. Corporation.

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Petitioner James E. Stiltner, respectfully prays that a writ of certiorari issue to review the divided *en banc* judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding in *Stiltner v. Beretta U.S.A. Corp.*, No. 94-1323 (4th Cir. Feb. 2, 1996).

OPINIONS BELOW

The decision of the divided *en banc* United States Court of Appeals for the Fourth Circuit is reported at 74 F.3d 1473 (1996) and is reprinted in the Appendix ("App.") to this Petition at 1a. The initial panel decision of the Court of Appeals for the Fourth Circuit was vacated when rehearing *en banc* was granted; it is reprinted at App. 39a for reference. The decision of the United

States District Court for the District of Maryland on the § 510 issue is unreported and is reprinted at App. 90a.

STATEMENT OF JURISDICTION

The *en banc* judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140, provides as follows:

> *Interference with protected rights.* It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding related to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

On November 21, 1988, Petitioner James E. Stiltner began working as a tool room supervisor for Beretta, the arms manufacturer. He worked initially on a contract basis and later was offered a job as a regular full-time manager. Beretta knew that Mr. Stiltner was suffering from a heart

condition when it offered him employment and promised him disability coverage. Beretta enrolled Mr. Stiltner in two benefit programs: Beretta USA Health Plan (Health Plan) and Beretta USA Life and Disability Plan (the Disability Plan).

Mr. Stiltner suffered a heart attack at work on February 6, 1990, but was able to work intermittently during the next few months. He suffered another heart episode on June 9, 1990, requiring a lengthy hospitalization, and was unable to work after that time.

During his hospitalization, Mr. Stiltner applied for long-term disability benefits under Beretta's Disability Plan. His application was initially denied on the basis that his heart ailment was a pre-existing condition. Like other disabled Beretta employees, Mr. Stiltner's health insurance was continued by Beretta while he pursued his claim for long-term disability benefits.[1]

Two years after Mr. Stiltner stopped working, but while he was still considered an employee, he was given notice that Beretta's Disability Plan had finally decided to deny his claim for long-term disability benefits. Mr. Stiltner, through counsel, wrote to Beretta asking that it pay for the promised long-term disability benefits due under the terms of his employment contract and the Disability Plan. The letter also informed Beretta that Mr. Stiltner intended to assert an ERISA claim against the Company for the long-term disability benefits.

Significantly, Beretta responded with the threat that if Mr. Stiltner did not accept a nominal monetary payment and eighteen months of health coverage in exchange for surrender of his ERISA disability claim by a certain date,

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[1] Typically, Beretta continued the health insurance of disabled employees until their disability benefits began to be paid. The Health Plan provides for discretionary continued coverage for employees who "cease active work due to illness or injury, lay-off, retirement or leave of absence." App. 43a.

the Company would "terminate all payments, whether for health insurance or for any other cause, on [Stiltner's] behalf." App. 24a. At this time, Beretta's officials knew that Mr. Stiltner was totally disabled and his crippled wife was unable to work.

Thereafter, Mr. Stiltner filed an action in the United States District Court for the District of Maryland, asserting under ERISA that he was entitled to long-term disability benefits. The petitioner also sought injunctive relief against Beretta's threatened termination of his health benefits, alleging that the termination violated the Health Plan and § 510 of ERISA. In a bench decision, the district court denied his request for preliminary injunctive relief. App. 95a.[2] Summary judgment was later entered against the petitioner on all issues.

On appeal, a divided three-judge panel of the Fourth Circuit Court of Appeals vacated the district court's decision on the § 510 claim. See App. 75a.[3] To violate § 510, the panel majority held, the retaliatory action in question "need not substantially affect on-going employment relations between the parties . . . ." App. 74a. The termination of existing benefits that an employer has no contractual obligation to provide—in particular, Beretta's elimination of gratuitous health benefits—"can be actionable under § 510, when [] substantially motivated by an improper intent to retaliate, rather than by legitimate business considerations." App. 74a.

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[2] The district court's denial of a preliminary injunction was appealed to the United States Court of Appeals for the Fourth Circuit. While his appeal was pending, the district court granted summary judgment on all counts. *Stiltner v. Beretta U.S.A. Corp.*, 844 F. Supp. 242 (D. Md. 1994). The court of appeals, *sua sponte*, dismissed as moot his appeal from the denial of a preliminary injunction. The petitioner then appealed the district court's final judgment.

[3] The panel affirmed the district court on all other counts. App. 75a.

The Fourth Circuit Court of Appeals then granted rehearing *en banc*, vacated the panel's decision and issued a new decision on February 2, 1996, affirming in all respects the district court's grant of summary judgment in Beretta's favor.[4] The majority held that "[b]ecause ERISA § 510 was modeled on NLRA § 8(a)(3)," and that because under § 8(a)(3), revocation of gratuitous benefits is not unlawful discrimination, it cannot be under ERISA either.[5] App. 18a-19a. The majority concluded that termination of "gratuitously" extended benefits does not violate ERISA § 510. App. 16a.

The dissent held that because it is "undisputed that Beretta ceased paying Stiltner's insurance premiums in specific[]" retaliation for his assertion of ERISA rights, "the fact that Beretta was not legally obligated to pay the premiums [is] irrelevant" to a finding of a § 510 violation. App. 37a.

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[4] The majority decision was written by Judge Hamilton who was joined by seven other judges. Senior Judge Phillips, who authored the panel decision, dissented with respect to the § 510 issue, joined by Chief Judge Ervin and Judges Hall, Murnaghan, and Michael. App. 37a.

[5] National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3), provides in relevant part:

> It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . .

REASONS FOR GRANTING THE WRIT

THE MAJORITY DECISION OF THE FOURTH CIRCUIT IS CLEARLY WRONG. THE DECISION HAS NO SUPPORT IN THE WORDING OF THE STATUTE OR THE LEGISLATIVE MATERIALS; IS CONTRARY TO THIS COURT'S STATEMENT OF ERISA'S PURPOSE; AND RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE CONCERNING THE ADMINISTRATION AND ENFORCEMENT OF ERISA. THE QUESTION PRESENTED IS RELATED TO THAT AT ISSUE IN *ROBINSON v. SHELL OIL* IN WHICH A WRIT OF CERTIORARI WAS RECENTLY GRANTED.

The decisions below establish that employer Beretta threatened in writing that it would terminate participant Stiltner's health care coverage if he pursued an ERISA claim for long-term disability benefits. The *en banc* decision of the Court of Appeals for the Fourth Circuit holds that ERISA § 510, the statute's anti-retaliation provision, does not protect participants from this kind of blatant and intentional retaliation because it involves what the court characterized as a "gratuitous" benefit, one the employer was not contractually obliged to continue.

The petition should be granted because this decision is clearly wrong and presents an issue of exceptional importance concerning the administration and enforcement of ERISA. The decision is wrong because the lower court improperly confined § 510's protections to the employment relationship. It accomplished this feat by limiting the statute's anti-discrimination prohibition to the deprivation of benefits that qualify as "terms or conditions of employment" under judicial interpretations of dissimilar language contained in § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3).

Equally significant, this case presents an issue of exceptional importance, for, as the five-judge dissent stated, its effect is to permit employers to retaliate "with impunity" against "ERISA-plan participants . . . by cutting off any benefits being provided them, for whatever reason, just so long as they are not legally enforceable obligations." App. 36a-37a. The fundamental protections guaranteed by ERISA are designed primarily for enforcement through private lawsuits brought by aggrieved participants and beneficiaries. By allowing employers to retaliate against individuals bringing such claims, the decision threatens to stifle effective enforcement of ERISA and thus raises a question of exceptional importance.

The Court recently granted certiorari in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995) (en banc), *cert. granted*, 1996 U.S. LEXIS 2677 (U.S. Apr. 22, 1996), which involves the construction and scope of Title VII's similar anti-retaliation provision.

1. There is no support in the wording or legislative history of the statute for excluding so-called "gratuitous" benefits from the protection of ERISA § 510. In relevant part, ERISA § 510 provides: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter . . . ." This is a broad provision. It applies not just to employers, but to "any person." It protects not just employees, but all "participants and beneficiaries." It prohibits not just employment-related retaliation—"discharge," "suspend," "discipline"—but also non-employment retaliation—"fine" and "expel"—and, in a final catchall phrase, makes it unlawful to "discriminate" against participants and beneficiaries who pursue ERISA claims.

Prior to the instant case,[6] § 510 had been broadly construed consistent with its wording "to protect working men and women from the abuses in the administration and investment of private retirement plans and employee

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[6] Senior Judge Phillips noted in dissent that "no court, so far as I am aware, has until now held that an employer's retaliatory cutting off of 'gratuitously'-provided benefits cannot ever be found a violation of § 510's anti-retaliation provision." App. 31a.

welfare plans." *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982) (en banc); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 975-76 (5th Cir. 1991). The lower courts have repeatedly held that the central purpose of § 510 is to protect participants and beneficiaries from any "economic sanctions" or "violence" that would coerce a participant or beneficiary in the exercise of any right guaranteed by ERISA.[7]

The broad interpretation generally given to § 510 is consistent with the broad interpretation given to the anti-retaliation provisions of other statutes that guarantee comparable economic rights. The anti-retaliation provisions of the ADEA and Title VII, which likewise do not explicitly define the word "discriminate,"[8] have been interpreted to prohibit any kind of adverse action. *Passer v. American Chemical Soc'y*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (canceling a special symposium in employee's honor could constitute actionable "discrimination" under

[7] *See, e.g., Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589-90 (1st Cir. 1989) (employee threatened with loss of employment rights for spouse's filing of ERISA claim stated cause of action for violation of § 510); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 857-58 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (discriminatory layoff to avoid paying benefits is a violation of § 510); *McGinnis v. Joyce*, 507 F. Supp. 654, 656-57 (N.D. Ill. 1986) (union's threats of violent reprisals if plaintiff continued ERISA lawsuit constituted violation of § 510).

[8] See 42 U.S.C. § 2000e-3(a) (Title VII: making it unlawful for an employer "to *discriminate* against any . . . employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by [Title VII] . . . or . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]" (emphasis added); 29 U.S.C. § 623(d) (ADEA: making it unlawful for an employer "to *discriminate* against any . . . employees or applicants for employment, . . . because such individual . . . has opposed any practice made unlawful by [the ADEA] . . . or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]" (emphasis added).

ADEA's anti-retaliation clause); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (malicious prosecution suit by employer is actionable retaliation under Title VII); *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 259-61 (N.D.N.Y. 1993) (employer's retaliatory termination of "gratuitous" health benefits actionable under ADEA's anti-retaliation provision). Indeed, § 510 of ERISA is even broader than Title VII and the ADEA because it is not limited by its terms to "employees."[9]

As these cases demonstrate, the calculus employed in determining whether the action complained of violates an anti-retaliation prohibition typically found in federal employment statutes is simple and straightforward. As the court explained in *Passer*, the threshold question is whether the employer's action had "an adverse impact" upon the protected individual; the inquiry is then whether "the adverse action was causally related to the plaintiff's exercise of protected rights." 935 F.2d at 331.

This is precisely the situation here. Mr. Stiltner informed Beretta that he intended to pursue a claim for long-term disability. Beretta threatened to terminate Mr. Stiltner's health coverage if he pursued the disability claim. Mr. Stiltner persisted, and, when the district court denied his request for a preliminary injunction, Beretta terminated his coverage.

2. The legislative materials do not support any exception that would allow an employer to retaliate against an ERISA claimant by terminating "gratuitous" or non-contractual benefits. To the contrary, the legislative history demonstrates that the purpose of § 510 is to protect participants and beneficiaries from *any* action by an em-

[9] The question whether the scope and application of the anti-retaliation provision of Title VII is limited to "employees" or extends to "former employees", which presently divides the circuits, is now before this Court in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995) (en banc), *cert. granted*, 1996 U.S. LEXIS 2677 (U.S. Apr. 22, 1996).

ployer (or "any person") that is intended to interfere with the exercise of ERISA-guaranteed rights.

The Senate Committee Report states:

> These provisions [29 U.S.C. §§ 1140-41] were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of *economic sanctions or violent reprisals* . . . . [T]he Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.[10]

Indeed, one of the primary sponsors of the Pension Reform Bill, Senator Williams, in explaining the Conference Report, emphasized that:

> A further protection for employees is the prohibition against discharge, *or other discriminatory conduct toward participants and beneficiaries which is designed to interfere* with attainment of vested benefits or other rights under the bill, *or to discourage the exercise of any rights* afforded by the legislation. Either the employee or the Secretary of Labor may bring suit to redress such violations.[11]

Thus, the legislative history, as well as this Court's previous ruling, prove that Congress' intention was to "preclude abuse and 'to completely secure the rights and

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[10] S. REP. No. 127, 93rd Cong., 2d Sess. 36 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872; *also reprinted in* I SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 622 (Comm. Print 1976) (emphasis added).

[11] 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams); *reprinted in* III SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4745 (Comm. Print 1976) (emphasis added).

expectations brought into being by this landmark reform legislation.'" *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990).

3. The court below excluded "gratuitous" benefits from the protection of § 510 based on a single statement by a single legislator that ERISA § 510 "parallels" NLRA § 8(a)(3). The court used this single statement to impose on the unqualified wording of § 510 the limitation of NLRA § 8(a)(3) to "discrimination *in regard to hire or tenure of employment or any term or condition of employment*."[12] This exercise in statutory interpretation ignores the wording of § 510, takes the legislative statement completely out of context, and borrows a clause from NLRA § 8(a)(3) to impose a limitation on ERISA § 510 never enacted or intended by Congress.[13]

The court relies on Senator Hartke's statement that "[t]he language [of ERISA § 510] parallels section 8(a)

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[12] 29 U.S.C. § 158(a)(3) (emphasis added). In fact, the decision below imports into ERISA § 510 not just the words that limit NLRA § 8(a)(3), but also the whole body of precedent developed by the National Labor Relations Board under that separate statute for determining what is and is not "in regard to hire or tenure of employment or any term or condition of employment," for it is this body of precedent that the court refers to in determining whether Mr. Stiltner's health coverage is "gratuitous." App. 18a-19a.

[13] Equally mistaken is the court's reliance upon several other lower court decisions for the proposition that "discriminate against" contemplates only "actions affecting the employer-employee relationship." App. 19a, *citing Haberern v. Kaupp Vascular Surgeons Ltd. Defined Pension Plan*, 24 F.3d 1491, 1503 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1099 (1995); *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 668-69 (7th Cir. 1993); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991). It makes no sense to limit the discrimination prohibited by § 510 to actions affecting the employer-employee relationship when § 510 explicitly includes within its scope terms such as "fine" and "expel" that unmistakably demonstrate that the protection of § 510 extends more broadly.

(3) of the National Labor Relations Act . . . ." App. 17a-18a. Senator Hartke was neither the floor leader nor even a sponsor of the legislation. At the time he made this statement, the Senator was advocating an amendment that would have created "administrative machinery" for enforcing what became § 510. The amendment was never adopted. In passing, the Senator described § 610 of Senate Bill 4, which later became ERISA § 510, as follows:

> In recognition of that problem, section 610 of S. 4 as originally reported—made it illegal to 'discharge, fine, suspend, expell, [sic] discipline or discriminate' against plan participants to defeat rights under the act or a plan. The language parallels section 8(a)(3) of the National Labor Relations Act and should do the trick—but only if an adequate enforcement machinery exists.[14]

Far from any intent to limit § 510 by reference to NLRA § 8(a)(3), it is clear that Senator Hartke was using the NLRA provision to indicate the breadth of the protection afforded by § 510. His remarks do not mention the limitation of NLRA § 8(a)(3) to "discrimination in regard to hire or tenure of employment or any term or condition of employment" and give absolutely no indication that he advocated any such limitation on ERISA § 510. Senator Hartke's statement is not a sufficient basis for importing any limitation from NLRA § 8(a)(3).

This Court has, in particular, firmly admonished against such an "imported wholesale" application of the NLRA to other statutes. *See Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). What the Court said in *Jacksonville Terminal* applies equally here: the use of NLRA limitations sim-

[14] 119 CONG. REC. 30,374 (1973), *reprinted in* II SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1775 (Comm. Print 1976) (statement of Sen. Hartke).

ply "has no direct application to the present case." 394 U.S. at 377. "Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." 394 U.S. at 383. There is, in short, no basis for limiting the unqualified wording of ERISA § 510 by importing a limitation from another statute enacted nearly forty years earlier because of a single legislator's statement. The court below should have heeded its own words in another recent *en banc* decision: "[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Robinson v. Shell Oil Co.*, 70 F.3d at 328.[15] The express limitation of NLRA § 8(a)(3) has no place in ERISA § 510.

4. This case involves a question of exceptional importance concerning the administration and enforcement of ERISA. Congress deliberately determined that ERISA's important protections would be enforced primarily through private legal action. As this Court has noted, "a 'carefully integrated' civil enforcement scheme . . . 'is one of the essential tools for accomplishing the stated purposes of ERISA.'" *Ingersoll-Rand Co.*, 498 U.S. at 137, *quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52, 54 (1987). The statute explicitly creates a private right of action for violation of its guarantees. ERISA § 502(a), 29 U.S.C. § 1132(a); *Varity Corp. v. Howe*, 64 U.S.L.W. 4138 (U.S. Mar. 19, 1996). The statute encourages private enforcement by making attorneys' fees available to successful plaintiffs. ERISA § 502(g), 29 U.S.C. § 1132(g). The anti-retaliation provision is an equally critical part of this scheme. Broad construction of its

[15] The Court of Appeals for the Fourth Circuit in *Robinson v. Shell Oil Co.*, continued: "We must acknowledge that the duty of this Court is to adhere faithfully to the rules of statutory interpretation rather than 'to exercise[]' a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear. . . ." 70 F.3d at 328.

safeguards is essential to insure that participants and beneficiaries are not forced to choose between receiving so-called "gratuitous" benefits and asserting their ERISA rights.

Although this case involves only one plaintiff and a single instance of employer retaliation, the mischief caused by the decision threatens effective private enforcement of the statute. Indeed, its impact is immediate and severe because there is a historic interplay between disability or retirement benefits and discretionary employer-provided health benefits. Like Beretta, many employers provide former employees with continued health benefits upon disability. Discretionary health coverage of that sort becomes a powerful weapon in the employer's hands should any former employee wish to challenge the deprivation of other benefits. As the five dissenting judges noted, the direct precedential effect of the decision is that:

> . . . in this circuit from now on employers may with impunity retaliate against ERISA-plan participants who exercise statutory rights against their perceived interests by cutting off any benefits being provided them, for whatever reason, just so long as they are not legally enforceable obligations.

App. 36-37a. ERISA claimants elsewhere will be deterred by the prospect that *Stiltner* may become law in their circuit and will be forced to weigh that possibility before pursuing their ERISA claims in the face of a threatened termination of "gratuitous" benefits. The effect on private enforcement of the statute is potentially crippling. Whether it is justified as a matter of statutory interpretation should be addressed by the Court now, not later.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2, 1996

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94-1323

JAMES E. STILTNER,
Plaintiff-Appellant,

v.

BERETTA U.S.A. CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, Chief District Judge.
(CA-92-3507-JFM)

Argued: September 27, 1995

Decided: February 2, 1996

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge, sitting en banc.

OPINION

HAMILTON, Circuit Judge:

Appellant, James E. Stiltner (Stiltner), appeals an order granting summary judgment in favor of his former employer, Beretta U.S.A. Corp. (Beretta), on Stiltner's

ERISA and state law claims against Beretta. A divided panel of this court affirmed the summary judgment as to Counts I, II, and IV of Stiltner's complaint, but vacated and remanded as to Count III of the complaint. *See Stiltner v. Beretta U.S.A. Corp.*, No. 94-1323 (4th Cir. January 18, 1995) (designated for publication, but not reported). On Beretta's suggestion, we vacated the panel decision and reheard the case *en banc*. Having considered the briefs and the arguments of the parties, we now affirm *in toto* the district court's grant of summary judgment.

I.

On November 21, 1988, Stiltner began working as a tool room supervisor for Beretta, a Maryland arms manufacturer. Frank Valorose, a Beretta employee, helped Stiltner obtain the job. Valorose had been Stiltner's manager at Stiltner's former job with FN Manufacturing (FN).

Stiltner's initial employment status was that of an independent contractor. Although he was not entitled to the fringe benefits that regular employees received, Stiltner received free housing from Beretta, as well as an allowance to pay for his COBRA coverage under FN's health insurance plan.[1]

On February 28, 1989, Beretta offered Stiltner a job as a regular employee. The terms of the offer were described in a letter given to Stiltner by Peter Axelrod, Beretta's human resources manager. Stiltner and Axelrod reviewed the letter together, and Stiltner signed the letter to indicate that he found the terms of the offer acceptable. Among the benefits described in the letter were the following:

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[1] Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), employers must offer terminated employees the option of continuing coverage under the employer's group health plan. 29 U.S.C. §§ 1161, 1163(2).

> Medical Insurance: Company paid hospitalization and medical insurance for you and your dependents . . . .
>
> Long Term Disability: Pays 60% of salary after six months of disability (after one year of employment). Payable to age 70.

(J.A. 83). Axelrod agreed to make Stiltner's regular employment date retroactive to November 21, 1988, for purposes of his eligibility for vacation and benefits.

Stiltner enrolled in two welfare benefit plans that Beretta provided for its employees. The first of these plans, Beretta U.S.A. Health Plan #501 (the Health Plan) provided group health insurance for all full-time employees and their eligible dependents. The Health Plan provided that coverage would cease at the end of the month in which an employee stopped active work on a full-time basis.

The second plan, Beretta U.S.A. Life and Disability Plan #502 (the Disability Plan), provided long-term disability benefits to full-time employees who became disabled after one year of employment. At the time Stiltner enrolled, American Bankers Life Assurance Company (American Bankers) provided the coverage under this plan. American Bankers issued a disability plan insurance policy that expressly excluded coverage for disabilities caused by pre-existing conditions. Although the certificate of insurance/benefits booklet that American Bankers issued to participants in the disability plan clearly disclosed this pre-existing condition limitation, the summary plan description then in effect for the disability plan (the original SPD) did not. Stiltner claims that he did not receive a copy of the certificate of insurance/benefits booklet until after he became disabled.

In February 1990, Beretta changed the insurer of its disability plan to the Guardian Life Assurance Company of America (Guardian). The Guardian policy, like the

American Bankers policy, had an express pre-existing condition limitation. The new certificate of insurance/benefits booklet issued by Guardian clearly disclosed the pre-existing condition limitation. Beretta sent copies of the new booket to participating employees, along with a memo entitled "Summary Plan Description Supplement to Certificate for the Beretta U.S.A. Health and Welfare Plans" (the SPD Supplement). The SPD Supplement stated that "[t]his supplement and your certificates of insurance/benefits booklets constitute the Summary Plan Description as required by [ERISA]." (J.A. 566). Stiltner claims that he did not receive a copy of either the new certificate of insurance/benefits booklet or the SPD Supplement until after he became disabled.

Stiltner suffered from a heart condition when he began working for Beretta. On February 6, 1990, he had a heart attack. After the heart attack, he worked sporadically until June 9, 1990. Since that date, he has not worked for Beretta or anyone else because of his heart problems.

To assist Stiltner in filing a disability insurance claim, Beretta sent Stiltner the new Guardian certificate of insurance/benefits booklet, the original SPD for the Disability Plan, and the SPD Supplement for that plan. Stiltner applied to Guardian for long-term disability benefits under the Disability Plan, and to the Social Security Administration for Social Security disability benefits. Guardian denied Stiltner's claim because his disability arose out of a pre-existing condition.

Beretta attempted to help Stiltner in several ways. First, Beretta wrote Guardian, urging it to reconsider its decision to deny Stiltner's claim for disability benefits. Second, although it was clear that Stiltner would never be able to return to work after June 9, 1990, Beretta kept paying Stiltner his full salary until October 1990, when Stiltner began receiving Social Security disability benefits. Third, despite a provision in the Health Plan

stating that coverage would end when he ceased active work on a full-time basis, Beretta kept paying Stiltner's health insurance premiums while Guardian was considering his claim for disability benefits.

In June 1992, Guardian informed Stiltner that its decision to deny his claim for long-term disability benefits was final. Subsequently, Stiltner demanded that Beretta pay him more than $330,000 in long-term disability benefits. He claimed that he was entitled to the benefits under the terms of his employment contract and the Disability Plan, regardless of the exclusions in the insurance policies. Beretta, which was still gratuitously paying Stiltner's health insurance premiums, refused Stiltner's demand. Stiltner then informed Beretta that he intended to assert an ERISA claim for long-term disability benefits and offered to settle that claim for approximately $332,000. Although Beretta did not believe it was legally obligated to pay Stiltner the disability benefits, it offered to pay him $3,000 and to continue paying his health insurance premiums for an additional 18 months, if he would agree to release it from all liability arising from his claim for disability benefits. Beretta added that if Stiltner refused to accept this settlement, it would cease paying any further health insurance premiums on Stiltner's behalf.[2]

Stitltner filed this action against Beretta, raising four claims. In Count I of his complaint, Stiltner alleged that he was entitled to recover long-term disability benefits from Beretta under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because the original SPD for the Disability Plan did not mention the pre-existing condition exclusion. In Count II, he alleged that he was entitled to the disability benefits under the terms of the February 28, 1989 offer letter, which Stiltner described as an employment contract. In Count III, Stiltner alleged that Beretta violated ERISA § 510, 29 U.S.C. § 1140, by stating that

[2] Beretta did not withdraw the gratuitously furnished health care benefits until March 1993.

it would stop paying for his health insurance coverage if he exercised his rights under ERISA to sue Beretta for disability benefits. Finally, in Count IV, he alleged that Beretta's refusal to pay him the disability benefits and its threat to cut off his health insurance benefits if he did not drop his claim for those disability benefits constituted intentional infliction of emotional distress under Maryland law.

Stiltner also sought a temporary restraining order and preliminary injunction to prevent Beretta from terminating his health insurance benefits, expelling him from the Health Plan, severing his employment relationship, or otherwise retaliating against him for exercising his rights under the Disability Plan and ERISA, pending final determination of the merits of his case. The district court denied the motion for preliminary relief.

Stiltner appealed the district court's denial of his request for preliminary relief. While his appeal was pending before this court, the district court granted summary judgment in favor of Beretta on all of Stiltner's claims. We, therefore, *sua sponte*, dismissed Stiltner's appeal involving the denial of his request for a preliminary injunction. *Stiltner v. Beretta U.S.A. Corp.*, No. 93-1247 (4th Cir. March 28, 1994). Stiltner now appeals the district court's grant of summary judgment in favor of Beretta.[3]

II.

In Count I of his complaint, Stiltner alleged that he was entitled to recover long-term disability benefits from Beretta under ERISA § 502(a)(3), 29 U.S.C. § 1132

[3] The panel, like the *en banc* court, was unanimous in rejecting Stiltner's claims that Beretta violated ERISA § 502, the terms of his employment contract, and Maryland law. Judge Phillips wrote the panel decision, which was designated for publication, but not reported. *See Stiltner v. Beretta, U.S.A. Corp.*, No. 94-1323 (4th Cir. January 18, 1995). We have incorporated verbatim Judge Phillips' well-reasoned analysis of these claims in parts II, III, and IV of this opinion.

(a)(3),[4] even though his disability was caused by a pre-existing condition within the meaning of the exclusion in the Guardian policy, because the pre-existing condition limitation was not mentioned in the original SPD for the Disability Plan. Stiltner bases this claim upon our decisions in *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140-41 (4th Cir. 1993), and *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992), which he says hold that representations made in a summary plan description control over conflicting statements made in other official plan documents. The district court held that Beretta was entitled to summary judgment on this claim, because Stiltner had failed to come forward with sufficient evidence to permit a reasonable fact finder to find that he had either relied upon or been prejudiced by the original SPD's failure to mention the pre-existing condition exclusion.

We find no fault in the district court's disposition of this claim. It is certainly true that the original SPD was inconsistent with the other official plan documents, in that it failed to reveal the existence of the pre-existing condition limitation. But, as the district court recognized and Stiltner now concedes, to secure relief under ERISA based on representations in a summary plan description that are inconsistent with provisions of the other official plan documents, an ERISA claimant must demonstrate that he either relied upon or was prejudiced by those representations. *Aiken*, 13 F.3d at 141; *Pierce*, 979 F.2d at 27. As the district court pointed out, the summary judgment record contained undisputed evidence that Stiltner did not see a copy of the original SPD until after he suffered the disability for which he now seeks to recover benefits. (J.A. 286-87).[5] On this record, we agree

[4] ERISA § 502(a)(3) permits a participant in an ERISA plan to bring an action for "appropriate equitable relief . . . to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3).

[5] In an attempt to overcome this problem, Stiltner contends that he did come forward with evidence that members of Beretta's

with the district court that Stiltner failed to carry his burden of coming forward with sufficient evidence to permit a reasonable fact finder to find that he had relied upon or been prejudiced by the inaccuracy in the original SPD, which is an essential element of his claim for relief

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management team gave him "verbal and written descriptions of the information contained in [the original SPD]" when he first enrolled in the Disability Plan, that those descriptions did not mention a pre-existing condition limitation, and that he relied upon them to his detriment in failing to make other arrangements for long-term disability insurance. Specifically, he points to (i) deposition testimony that Valorose told him, over lunch on the day of his initial interview at Beretta, that the benefit package he would receive at Beretta would be "similar to" the one he had received from his former employer, FN; (J.A. 183, 189-90) (Valorose deposition); (J.A. 226) (Stiltner deposition); and (ii) evidence that Axelrod told him, both in the February 28, 1989 offer letter and in his oral discussions of the terms of that letter, that he would receive long-term disability benefits after one year of employment, without indicating that there was a pre-existing condition limitation on those benefits.

As did the district court, we find this evidence to be singularly lacking in probative value. In the first place, we do not think that Stiltner could reasonably have interpreted any of the alleged representations by Valorose or Axelrod as descriptions of the content of the original SPD, since none of them made any reference to that document. In addition, we do not think an ERISA claimant can be said to have "relied" upon an SPD that he has never seen, in the sense required by *Aiken* and *Pierce*, simply because he has relied upon informal oral and written summaries of its contents made to him by the employer's agents. *Cf. Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 60 (4th Cir. 1992) (plan participant not entitled to recover benefits to which he was not entitled under plain language of plan itself, simply because she claimed that plan administrator had made informal oral and written representations to her indicating that she would receive such benefits, where the alleged modifications to the plan were not implemented in conformity with the plan's formal amendment procedure), *cert. denied*, —— U.S. ——, 113 S. Ct. 1051 (1993); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453-54 (4th Cir. 1992) (Wilkinson, J., concurring).

under *Aiken* and *Pierce*.[6] We therefore conclude that the district court did not err in entering summary judgment for Beretta on Stiltner's claim for disability benefits under ERISA § 502.

III.

In Count II of his complaint, Stiltner alleged that Beretta had breached the terms of its February 28, 1989 offer letter, which he characterized as a contract of employment, by refusing to pay him the disability benefits he sought. Stiltner alleged that because the letter stated that Beretta would provide Stiltner with long-term disability insurance that "pays 60% of salary after six months of disability (after one year of employment)," without mentioning a pre-existing condition limitation, it imposed upon Beretta legally enforceable obligation to pay him long-term disability benefits if he became disabled after one year of employment, whether or not the disability in question was caused by a pre-existing condition.

The district court held that Beretta was entitled to summary judgment on this claim. The court thought that the claim was probably preempted by ERISA, under *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 298 (4th Cir. 1993), because it "related to" the Beretta Disability Plan. But the court found it unnecessary to decide whether the claim was actually preempted or not. As the court explained, if the claim were preempted, it would fail as a matter of law because it could not be recast as a viable federal claim. The offer letter could not be enforced as an informal ERISA plan, because it did not meet the four requirements for a plan set forth in *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*). Similarly, it could not be enforced

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[6] In light of this conclusion, we need not address Beretta's alternative argument that Stiltner cannot maintain an *Aiken/Pierce* claim based on the original SPD because it was superseded by the SPD Supplement before he became disabled.

under a federal common-law breach of contract theory, because no reasonable fact finder could find that the parties intended it to impose upon Beretta an obligation to pay Stiltner long-term disability benefits above and beyond those provided by the terms of the Disability Plan. (J.A. 14-15). Finally, even if the claim were not preempted, it would still fail as a matter of law under basic principles of Maryland contract law, for the same reason that it would fail under federal common-law contract principles: because no reasonable fact finder could find, on the record before it, that the parties had intended the offer letter to impose upon Beretta a corporate obligation to pay Stiltner long-term disability benefits beyond those provided by the Disability Plan that Beretta maintained through its insurer.

Once again, we find no fault with the district court's disposition of this claim. As did the district court, we think it very likely that the claim is preempted by ERISA § 514(a), because it seeks to recover benefits of a sort which are already provided by an ERISA plan, even though it seeks to recover them not from the plan itself, but from the employer directly. *See Biggers*, 4 F.3d at 298; *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295 (5th Cir. 1989). We also agree with the district court that if the state-law breach of contract claim is preempted, it cannot be salvaged by recasting it as a statutory ERISA claim or a federal common-law claim, because it would fail as a matter of law under either theory. The representations about disability benefits made in the offer letter cannot be enforced as an independent ERISA plan, because the letter does not constitute a "plan" under the test set forth in *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (9th Cir. 1982) (*en banc*), which this Court adopted in *Elmore v. Cone Mills*, 23 F.3d 855, 861 (4th Cir. 1994) (*en banc*).[7] Nor do the representations about disability benefits made in the offer letter give rise to a viable claim for benefits under the federal common law of contract; as the district court explained at some length, no reasonable fact finder could possibly find that the parties intended them to impose upon Beretta an obligation to pay Stiltner long-term disability benefits above and beyond those provided by the terms of the Disability Plan itself. Finally, even if the claim is not preempted, it would still fail as a matter of law under Maryland law, for the same reason that it would fail under federal common-law principles: because no reasonable fact finder could find that the parties intended the representations made about disability benefits in the offer letter to impose upon Beretta a corporate obligation to pay Stiltner long-term disability benefits beyond those provided by the Disability Plan that Beretta maintained through its insurer.

[7] The offer letter does not meet at least two of the four requirements for an informal plan under *Donovan*: it does not show the source of the funding for the benefits described, and it does not indicate the procedure by which an employee can apply for and receive benefits. *See Cone Mills*, 23 F.3d at 861; *Donovan*, 688 F.2d at 1373.

The district court did not err in entering summary judgment for Beretta on Stiltner's contract claim.

IV.

In Count IV of his complaint, Stiltner alleged that Beretta's conduct in refusing to pay him disability benefits and threatening to cut off his health insurance benefits if he did not drop his claim for disability benefits constituted intentional infliction of emotional distress under Maryland law. The district court held that Beretta was entitled to summary judgment on this claim on two independent, alternative grounds: because it was preempted by ERISA, and because the conduct complained of was not sufficiently "outrageous" to support a claim for intentional infliction of emotional distress under Maryland law. (J.A. 16-17). We agree.

ERISA preempts state-law claims to the extent they "relate to" any ERISA plan. 29 U.S.C. § 1144(a). A state-law claim "relates to" an ERISA plan, hence is preempted, "if it has a connection with or reference to such a plan," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983), so that state common-law tort and contract actions which are "based on alleged improper processing of a claim for benefits under an employee benefit plan" are preempted by ERISA. *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 48 (1987). Applying this analysis, the lower federal courts uniformly have held that state-law claims of intentional infliction of emotional distress which are based on the allegedly wrongful denial or termination of benefits under an ERISA plan are preempted by ERISA. *See, e.g., Lopez v. Commonwealth Oil Refining Co.*, 833 F. Supp. 86, 89-90 (D. P.R. 1993) (retired employee's state-law emotional distress claim based on allegedly wrongful offsetting of disability benefits by amount of social security income was preempted by ERISA, because it was "directly related to the dispute concerning the [retired employee's rights under] the employee welfare benefit plan"); *Lennon v. Walsh*, 798 F. Supp. 845, 849 (D. Mass. 1992) (plan participant's state-law emotional distress claim based on allegedly wrongful denial of claims for medical and disability benefits under ERISA plan was preempted by ERISA); *Thomas v. Telemecanique, Inc.*, 768 F. Supp. 503, 506 (D. Md. 1991) (discharged employee's state-law emotional distress claim based on allegedly wrongful accusations that she had been defrauding her employer by collecting disability benefits from its ERISA plan to which she was not entitled was preempted by ERISA, because "[t]he issue of whether the alleged conduct was extreme depends upon the parties' rights under the benefit plan"); *Parisi v. Trustees of Hampshire College*, 711 F. Supp. 57, 60-62 (D. Mass. 1989) (discharged employee's state-law emotional distress claim based on allegedly wrongful denial of claim for disability benefits was preempted by ERISA).

Stiltner attempts to distinguish these cases by arguing that his emotional distress claim is not based on allegations that Beretta wrongfully denied or terminated benefits to which he was entitled under its ERISA plans, but on allegations that it wrongfully denied or terminated benefits to which he was entitled under his employment contract. This argument is without merit. Count IV of Stiltner's complaint asserts a state-law emotional distress claim based on Beretta's conduct in "refusing to pay [him] agreed-upon disability benefits and [in] threatening him with discontinuance of his family health insurance benefits to coerce him into abandoning his disability claim." Complaint ¶ 39. Count IV expressly incorporates by reference paragraphs 1 through 37 of the complaint, *id.* ¶ 38, which in turn assert that Beretta is obligated to pay Stiltner disability benefits under the terms of *both* its Disability Plan and his employment contract. *Id.* ¶¶ 27, 31. For this reason, Stiltner's claim that Beretta acted wrongfully in refusing to pay him the "agreed-upon disability benefits" cannot be resolved without reference to the Disability Plan. This in turn means that the claim "relates to" an ERISA plan within the meaning of ERISA's preemption clause, and is therefore preempted. *See Thomas*, 768 F. Supp. at 506; *Lennon*, 798 F. Supp. at 849; *Parisi*, 711 F. Supp. at 61-62.

Even if Count IV were not preempted, Beretta would still be entitled to summary judgment on it, for the conduct in question is not sufficiently "outrageous," as a matter of law, to support a claim for intentional infliction of emotional distress under Maryland law. In Maryland, the tort of intentional infliction of emotional distress requires proof of "extreme and outrageous" conduct by the defendant, and conduct will be found to rise to that level only if it "go[es] beyond all possible bounds of decency, and [is] to be regarded as atrocious, and utterly intolerable in a civilized community." *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977). Applying this test, the Maryland

Court of Appeals has held that conduct very similar to that alleged here—the intentional refusal to pay medical and disability benefits to which the plaintiff claimed entitlement under an insurance plan—was not sufficiently "outrageous" to give rise to a claim for intentional infliction of emotional distress. *Gallagher v. Bituminous Fire & Marine Ins. Co.*, 492 A.2d 1280, 1284-85 (Md. 1985). As the court there noted, while it is "conceivable" that the tort of intentional infliction of emotional distress "might be committed by means of withholding benefits," it will be "the rare case" indeed in which this is so. *Id.* We agree with the district court that this is not such a case. *See Dickson v. Selected Risks Ins. Co.*, 666 F. Supp. 80, 81 (D. Md. 1987) (insurer's refusal to provide coverage under a liability insurance policy "does not approach the level of outrageousness necessary to sustain an intentional infliction of emotional distress claim" under Maryland law); *Barksdale v. St. Clair County Comm'n*, 540 So. 2d 1389, 1391 (Ala. 1989) (employer's termination of health benefits that it had been gratuitously providing to a disabled employee was not sufficiently "outrageous" to give rise to a tort claim for intentional infliction of emotional distress under Alabama law).

The district court did not err in entering summary judgment for Beretta on Stiltner's state tort claim for intentional infliction of emotional distress.

V.

In Count III of his complaint, Stiltner alleged that Beretta violated ERISA § 510, 29 U.S.C. § 1140, by stating that it would stop paying his health insurance premiums if Stiltner sued Beretta for disability benefits. To validate Stiltner's claim, we would have to interpret ERISA § 510 to preclude an employer from revoking *any* benefit if the employer intended to retaliate against an employee for the employee's exercise of ERISA rights, regardless of whether the employer had provided that

benefit gratuitously. This we refuse to do. We hold instead that ERISA § 510 does not preclude an employer from revoking gratuitous benefits.

A.

ERISA § 510 reads in pertinent part:

> *Interference with protected rights.* It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or *discriminate against* a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter [ERISA Title I], section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140 (emphasis added). This section prohibits two types of discrimination by an employer. First, an employer may not discriminate against an employee with the purpose of interfering with an employee's *exercise* of certain rights. Second, an employer may not discriminate against an employee with the purpose of interfering with an employee's *attainment* of certain rights. In this case, we are concerned with the first type of discrimination. Stiltner claims that Beretta discriminated against him with the purpose of interfering with his exercise of his right under ERISA to sue Beretta for his disability benefits. The particular act of discrimination alleged by Stiltner is Beretta's refusal to continue gratuitously paying his health insurance premiums.[8]

To determine whether Stiltner's allegations create a cognizable claim, we must decide whether, under ERISA

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[8] Beretta continued gratuitously furnishing health care benefits until March 1993, even though Stiltner did not work after June 1990, and Beretta continued Stiltner on salary until October 1990.

§ 510, an employer can "discriminate against" an employee by revoking a gratuitous benefit. Stiltner argues that the phrase "discriminate against" refers to any adverse action, including the revocation of a gratuitous benefit. After applying the settled rules of statutory construction to ERISA § 510, we disagree.

In any case turning on statutory interpretation, our goal is to ascertain the intent of Congress. *See Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990). To accomplish this goal, we begin by looking at the language of the statute. *Adams v. Dole*, 927 F.2d 771, 774 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991). If the language is plain and unambiguous, we look no further. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989). However, if the statutory phrase at issue is ambiguous, we may look beyond the language of the statute to the legislative history for guidance. *United States v. Irvin*, 2 F.3d 72, 76 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1086 (1994); *Adams*, 927 F.2d at 774. If Congress' intent is not readily apparent from examining the legislative history, we apply the traditional tools of statutory construction. *Adams*, 927 F.2d at 774; *see also Stupy v. United States Postal Serv.*, 951 F.2d 1079, 1081 (9th Cir. 1991) ("The search for legislative intent begins with an examination of the language of the statute and then proceeds to a review of the legislative history and the application of traditional aids of statutory interpretation.").

From the outset, we note the phrase "discriminate against" in ERISA § 510 is ambiguous. This view is in accord with other circuit courts that have examined the phrase. *See, e.g., West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (relying on ERISA § 510's legislative history to determine whether certain conduct constitutes discrimination); *see also Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991) (examining the legislative history of ERISA § 510 and stating that to

determine whether a claim is cognizable under that section, "we look first to the statute itself and the intent of Congress"). Accordingly, like other courts examining the phrase "discriminate against," we must turn to the legislative history.

Turning to the legislative history of ERISA § 510, we find that it is silent regarding whether Congress intended the revocation of gratuitous benefits to constitute discrimination. *See* S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872 (noting that ERISA § 510 was enacted "in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals").

Thus, from the legislative history, it is not at all apparent that Congress intended the revocation of gratuitous benefits to constitute discrimination for purposes of ERISA § 510. Moreover, the silence on this issue is some evidence that Congress did not intend such a result. *See Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) (holding that in construing ambiguous language in the Bankruptcy Code, it is not plausible to assume that Congress intended to create a broad new remedy when such a new remedy is not mentioned in the Code or in the annals of Congress).

The legislative history of ERISA § 510 does make clear, however, that the statute was modeled on § 8(a)(3) of the National Labor Relations Act (NLRA). *See West*, 621 F.2d at 245 & n.4; *Young v. Standard Oil*, 660 F. Supp. 587, 597 (S.D. Ind. 1987), *aff'd*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); *see also* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (Comm. Print 1976), at 1774-75 (statement of Sen. Hartke) ("The language [of

ERISA § 510] parallels section 8(a)(3) of the National Labor Relations Act . . . .").[9]

Because ERISA § 510 was modeled on NLRA § 8 (a)(3), we may look to NLRA § (a)(3), and the cases construing it, for guidance in construing ERISA § 510. Under NLRA § 8(a)(3), "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" constitutes an unfair labor practice. 29 U.S.C. § 158(a)(3). This language is similar to the language in ERISA § 510 forbidding employers from "discriminat[ing] against" employees for exercising any ERISA right. The "[i]ncorporation of identical *or similar* language from an act with a related purpose evidences some intention to use it in a similar vein." *See Doe v. DiGenova*, 779 F.2d 74, 83 (D.C. Cir. 1985) (emphasis added); *see also Stribling v. United States*, 419 F.2d 1350, 1352-53 (8th Cir. 1969) (express language and legislative construction of another statute employing similar language and applying to similar persons may control by analogy); 2B George Sutherland, *Statutes and Statutory Construction* § 53.03, at 233 (5th ed. 1992) ("[B]y transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court . . . is able to give effect to the probable intent of the legislature . . . .").

Under NLRA § 8(a)(3), an employer's revocation of a gratuitous benefit does not constitute unlawful discrimination. *See, e.g., NLRB v. Electro Vector*, 539 F.2d 35, 37 (9th Cir. 1976) ("[A] bonus which is considered a 'gift' can be withheld by the employer at will . . . ."), *cert. denied*, 434 U.S. 821 1977); *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 212 (8th Cir. 1965) ("The rule is that gifts per se . . . are not terms and

[9] Even Stiltner acknowledges that Congress modeled ERISA § 510 after NLRA § 8(a)(3).

conditions of employment, and an employer can make or decline to make such payments as he pleases . . . ."). Because NLRA § 8(a)(3) does not prohibit the revocation of gratuitously provided benefits and Congress modeled ERISA § 510 after the NLRA, we are reluctant to conclude that Congress intended ERISA § 510 to prohibit the revocation of gratuitous benefits.

Additionally, in cases involving interference with the attainment of ERISA rights, numerous courts have limited "discriminate against," as used in ERISA § 510, to actions affecting the employer-employee relationship. *See, e.g., Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1503 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1099) (1995); *see also McGrath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 667-69 (7th Cir. 1993) (interpreting ERISA § 510 to encompass only discrimination in the employment relationship); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991) (employer's acts must affect the employment situation to create a cognizable claim under ERISA § 510). With this interpretation of the phrase "discriminate against" so firmly entrenched, we are not inclined to ascribe a second meaning to the phrase in cases involving interference with the exercise of ERISA rights. In sum, we hold that ERISA § 510 does not prohibit the revocation of gratuitously provided benefits.

B.

Our holding that ERISA § 510 does not preclude an employer from revoking gratuitous benefits supports the public policy of encouraging employers to offer employees gratuitous benefits. Under Stiltner's interpretation of ERISA § 510, employers who seek to help their employees by providing gratuitous benefits risk a lawsuit if they revoke the benefits. Faced with the possibility that they could be forced to continue paying benefits originally provided gratuitously, employers may be inclined to turn

a cold shoulder to the special needs of particular employees. *See Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 79 (3d Cir. 1991) ("Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits."), *cert. denied*, 503 U.S. 938 (1992).

Although Congress has determined, by enacting ERISA § 510, that once an employer elects to include certain benefits within its employment package, it cannot revoke them with the intent to deter employees from asserting their rights under ERISA, this policy has no application when the benefits at issue are merely gratuitous. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("Absent contractual obligation, employers may decrease or increase benefits."); *Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990) ("ERISA is concerned with protecting *contractual* benefits.") (emphasis added). The contrary interpretation urged by Stiltner would only work to the detriment of employees.

C.

Although ERISA § 510 does not apply to the revocation of gratuitously provided benefits, employers cannot escape liability under ERISA § 510 for revoking all benefits conferred on employees. In some cases, a benefit that was originally provided gratuitously may develop into a nongratuitous benefit. Section 510 does apply to the revocation of a nongratuitous benefit.

A benefit may become nongratuitous, and thus be protected under ERISA § 510, when it is provided regularly and consistently, when the employer has a formal policy that determines eligibility for the benefit, or when the employer refers to the benefit as an inducement to future employees. *Cf. New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (holding, in the labor relations context, that a one-time gift is not a condition of employment); *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 503 (5th Cir. 1964) (discussing, in the labor relations

context, factors that may determine whether a benefit is a term or condition of employment). On the other hand, a benefit is merely gratuitous when there is a lack of consistency or regularity in providing the benefit and when there is no official program under which the benefits are provided, *i.e.*, the benefits are provided entirely at the employer's discretion.

D.

Stiltner concedes that Beretta's payment of his health insurance premiums after he ceased working amounted to a gratuitous benefit. Because the benefit was gratuitous, Beretta could revoke it freely without violating ERISA § 510.[10]

E.

In summary, we can find no support for Stiltner's interpretation of the ambiguous phrase "discriminate against" in the language of ERISA § 510, in the legislative history of ERISA § 510, or in public policy. His interpretation would require us to hold that an employer that paid an employee's health insurance premiums when it unquestionably had no duty to do so discriminated against the employee by refusing to continue this gratuity after the employee threatened to sue for additional benefits. To conclude, as Stiltner does, that Congress could have intended to punish this employer is nothing short of startling. Without any indication from Congress that it intended this

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[10] Beretta gratuitously paid Stiltner's health insurance premiums for almost three years, without any indication that it intended to terminate those benefits. In 1992, Beretta re-enrolled Stiltner in its employee health care plan. Coverage under the plan was to remain in effect until August 1, 1993. Beretta also sent Stiltner a letter indicating that he was re-enrolled in the health care plan as an inactive employee on leave of absence. Normally, these facts would create a genuine issue of material fact as to whether the payment of health insurance premiums had developed into a nongratuitous benefit. In the present case, however, Stiltner *conceded* that Beretta had no obligation to continue paying his health insurance premiums. Thus, these facts do not affect the analysis.

startling result, we decline to ascribe such an intent to Congress.

VI.

For the reasons stated in this opinion, the judgment of the district court is affirmed.

AFFIRMED

LUTTIG, Circuit Judge, concurring in the judgment:

I believe that section 510 of ERISA, 29 U.S.C. § 1140, protects employees only against discriminatory actions that substantially affect the employment relationship, as virtually every court of appeals to consider the scope of this provision has concluded, *see, e.g., Haberern* v. *Kaupp Vascular Surgeons Plan*, 24 F.3d 1491, 1502-06 (3d Cir. 1994); *Deeming* v. *American Standard Inc.*, 905 F.2d 1124, 1126-28 (7th Cir. 1990); *West* v. *Butler*, 621 F.2d 240, 245-46 (6th Cir. 1980), and that the cessation of wholly gratuitous benefits is not action that properly may be understood as affecting the employer-employee relationship. This belief, together with the fact that section 510 is modeled after section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which itself does not prohibit discrimination in gratuities, are sufficient in my mind to justify the majority's holding that section 510 should not be extended to protect against discrimination with respect to benefits that are wholly gratuitous. For these reasons, I concur in the court's judgment.

I ascribe no particular significance to the fact that section 8(a)(3) of the National Labor Relations Act includes, but section 510 of ERISA omits, the language "term or condition of employment." It is evident that section 510 was "modeled" after section 8(a)(3) not in the sense that the actual language was imported into section 510, but rather, only in the sense that Congress wished to achieve in section 510 that which it had achieved in section 8(a)(3), namely, the protection of employees against employer retaliation for the exercise of protected

rights. Indeed, virtually none of the language used in section 8(a)(3) is actually used in section 510. Thus, this is not the typical circumstance where Congress actually repeated the identical language from an extant statute in order that the subsequently-enacted statute would be identically interpreted, in which event the omission of particular language in the later statute might well be suggestive of a different intent. Here, any negative implication from the absence of any particular language in one of these provisions, and the inclusion of that language in the other, is simply unwarranted.

PHILLIPS, Senior Circuit Judge, concurring in part and dissenting in part:

I dissent from that part of the judgment which affirms dismissal of Stiltner's claim of discriminatory retaliation under ERISA § 510, and from Part V of the majority opinion which deals with that claim. Otherwise, I concur.

I would hold, contrary to the majority, that Stiltner's § 510 retaliation claim should not have been dismissed by summary judgment.

I

The dispute giving rise to this claim had its origins in times of apparently exemplary employment relations between Stiltner and Beretta. Stiltner, obviously a good and respected employee, had fallen on hard times with a first heart attack that forced him into intermittent work, then another attack four months later that put him in the hospital and out of work for good. While he was hospitalized, Beretta actively sought to help him through the economic difficulties brought on by his illness. The company first helped him process a claim for long-term disability benefits with the insurer of its disability-benefit plan. When the insurer initially denied the claim, Beretta urged the insurer to reconsider. During this time, Beretta continued to pay Stiltner his full salary for several months until he

began to receive social security disability benefits. And, finally, although Beretta's separate group health insurance plan provided that its coverage normally would end when an employee stopped active work on a full time basis, Beretta kept Stiltner's coverage in force by paying the premiums while his claim for disability benefits was pending. Beretta was still paying them when, two years after Stiltner stopped work, the insurer finally denied his disability benefits claim on the basis of a preexisting condition exclusion.

At this point, the good relations between Stiltner and Beretta began to sour. Taking the position that Beretta was liable to him under his employment contract and Beretta's ERISA-covered disability plan for the disability benefits its plan insurer had refused to pay, Stiltner, through counsel, made a formal written demand upon Beretta for over $330,000. When Beretta refused to pay, Stiltner notified Beretta that he intended to assert an ERISA legal claim for the disability benefits, and offered to settle that claim for around $332,000. Beretta responded by letter in which it denied any legal obligation to pay the disability benefits, but offered to settle Stiltner's claim by paying him a lump sum of $3,000 and continuing to pay his health insurance premiums for another eighteen months, in return for Stiltner's release of Beretta from all claims of liability for the disability benefits. Critically, Beretta's letter threatened that if Stiltner did not accept its counteroffer by a certain date, Beretta would "terminate all payments, whether for health insurance or for any other cause, on [Stiltner's] behalf."

After Stiltner had refused this offer and brought this action, Beretta followed through on its threat and ceased paying premiums on Stiltner's group health insurance plan.

Stiltner's action included the § 510 retaliation claim here in issue. This claim, based on the provision in § 510 which makes it unlawful for an employer "to . . . discriminate against a participant or beneficiary [in an ERISA

plan] for exercising any right to which he is entitled under [ERISA or an ERISA plan]," alleged such discrimination in Beretta's ceasing to pay the premiums on Stiltner's health insurance policy in promised reprisal for his threatening, then bringing, legal action to recover the disability benefits. Both the district court and the en banc majority rightly have recognized that this provision of § 510 is effectively an "anti-retaliation" provision of the type found, *inter alia*, in § 8(a)(3) of the National Labor Relations Act (NLRA).[1] But, both courts then concluded that Stiltner's retaliation claim failed as a matter of law on the summary judgment record: the district court, primarily because it thought § 510 retaliatory-discrimination must involve disparate treatment—not present here—of comparably situated persons, J.A. 7, 126-29; the en banc majority, because it thinks the termination of "gratuitously"-extended benefits cannot under any circumstances constitute retaliatory-discrimination under ERISA § 510, *ante* at 13 ("ERISA § 510 does not preclude an employer from revoking gratuitous benefits"); 17 (anti-retaliation "policy has no application when the benefits at issue are merely gratuitous"). By these different holdings, the district court may have accepted that gratuitous benefits might be the subject of the § 510 retaliatory-discrimination, but only if disparate treatment were involved, while the en banc majority apparently accepts that § 510 retaliatory-discrimination may involve singular (not disparate) forms of adverse treatment, but that the revocation of "gratuitous" benefits is not such a form. I think both are wrong in their interpretation of the intended reach of this anti-retaliation provision. Because I would reverse the district court's holding, but on grounds that also reject the en banc majority's interpretation, I address each in turn.

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[1] In so doing, both courts properly have rejected Beretta's first line of defense: that § 510 does not in this provision prohibit retaliation as a form of "discrimination." *See* Appellee's Br. 29-36.

II

Neither the literal text nor the legislative history of ERISA defines what it means to "discriminate against" a plan participant or beneficiary for purposes of the anti-retaliation provision of § 510. Specifically, neither speaks to whether, as the district court held, only disparate treatment can qualify. The legislative history of § 510 does indicate, however, that it was patterned on the anti-retaliation provision, § 8(a)(3), of the National Labor Relations Act (NLRA) in vital respects. *See* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (Comm. Print 1976), at 1774-75 (remarks of Senator Hartke) ("[Section 510's] language parallels section 8(a)(3) of the National Labor Relations Act."). For this reason, the courts properly have looked to the § 8(a)(3) precedents in interpreting various aspects of the parallel anti-retaliation provision of § 510. *See, e.g., West v. Butler*, 621 F.2d 240, 245 & nn. 4-5 (6th Cir. 1980); *Newton v. Van Otterloo*, 756 F. Supp. 1121, 1135-37 (N.D. Ind. 1991). Guidance on the question of what it means to "discriminate against" under § 510 may be found in this way.

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to encourage or discourage membership in any labor organization "by *discrimination* in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. § 158(a)(3) (emphasis added). It is well-established that the concept of "discrimination" under this section is not limited to disparate treatment of similarly situated employees, but includes any adverse action taken against one or more employees *because of* their decision to engage in protected activities. F. Bartosic & R. Hartley, *Labor Relations Law in the Private Sector* 114 (2d ed. 1986); *see Midstate Telephone Corp. v. N.L.R.B.*, 706 F.2d 401, 406 (2d Cir. 1983) (any action taken against an employee that

"attache[s] a penalty to [protected] activity" is "discriminatory" within the meaning of § 8(a)(3)); *N.L.R.B. v. Borden, Inc.*, 600 F.2d 313, 320 (1st Cir. 1979); *N.L.R.B. v. Jemco, Inc.*, 465 F.2d 1148, 1152 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). Retaliatory "discrimination" lies not in the fact that the employer is treating the employee less favorably than other similarly situated employees, but in the fact that it is treating him less favorably than it would have treated *him* had he not engaged in the protected activity. *See Jemco*, 465 F.2d at 1152 ("[The] discrimination . . . lies in the employment benefit [being] afforded to [the employee] prior to [his] engaging in a [protected] activity," but "denied to [him] after [he] engaged in such an activity."). Disparate treatment in this regard may of course be persuasive *evidence* of "discrimination" within the intended meaning of § 8(a)(3), but it is not an essential prerequisite to a finding of such discrimination. *See Borden*, 600 F.2d at 320. As the Sixth Circuit has explained, a contrary holding "would lead to the somewhat absurd result that an employer could never be found in violation of [section 8(a)(3)] so long as he was careful to treat all [similarly situated] employees alike, no matter how destructive of employee rights his conduct may be." *Jemco*, 465 F.2d at 1152.

The same interpretive reasoning applies to the anti-retaliation provision of ERISA § 510. Like NLRA § 8(a)(3), that provision is not designed to require employers to treat all persons under the base-statute's protections alike, but simply to prevent employers from using economic leverage to discourage certain activity by those persons that Congress wanted to protect. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("[Section 510] does not broadly forbid all forms of discrimination" in employment benefits, only discrimination "designed to retaliate for the exercise of a right or to interfere with the attainment of an entitled right.").

This interpretation of the term "discriminate" in § 510's anti-retaliation clause is also consistent with the established interpretation of the same term in similar anti-retaliation provisions in other federal employment statutes. Both Title VII and the Age Discrimination in Employment Act contain provisions that make it unlawful for an employer to retaliate against individuals for attempting to enforce those statutes against it.[2] Like § 510, both of these provisions forbid employers to "discriminate against" individuals for engaging in certain protected activity, but do not define the phrase "discriminate against." Both are consistently interpreted, however, to forbid an employer to take *any kind* of adverse action against an individual because he has engaged in the protected activity, even in the absence of evidence that it has treated him less favorably than other similarly situated individuals. *See, e.g., Passer v. American Chem. Soc.*, 935 F.2d 322, 331-32 (D.C. Cir. 1991) (employer's cancellation of special symposium in employee's honor could constitute actionable "discrimination" under ADEA's anti-retaliation clause, where done with specific intent to retaliate against him for asserting age discrimination claim against it); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) (any "adverse employment action"). Because the anti-retaliation provision at issue here uses the same "discriminate against" language as those other provisions, and was enacted after them, we may presume that Con-

[2] *See* 42 U.S.C. § 2000e-3(a) (making it unlawful for employer "to *discriminate against* any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII] . . . or . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]") (emphasis added); 29 U.S.C. § 623(d) (making it unlawful for employer "to *discriminate against* any of his employees . . . because such individual . . . has opposed any practice made unlawful by [the ADEA] . . . or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]") (emphasis added).

gress intended it to have the same basic meaning. *See Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989) (looking to case law under Title VII's anti-retaliation provision for guidance in interpreting § 510's anti-retaliation provision), *cert. denied*, 498 U.S. 814 (1990). *See generally Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979).

I would therefore hold, at odds with the district court, that the mere fact that Beretta's termination of healh insurance premium payments did not involve disparate treatment in relation to comparably situated other plan beneficiaries did not defeat Stiltner's anti-retaliation claim as a matter of law.

III

As earlier indicated, in affirming the district court's dismissal by summary judgment of Stiltner's § 510 retaliation claim, the en banc majority does not rely, as did the district court, on the notion that an employer cannot "discriminate against" an ERISA plan participant or beneficiary for retaliatory purposes except by disparate treatment in relation to comparably-situated others. The court instead affirms on the basis that an employer does not "discriminate against" a plan participant or beneficiary by revoking "gratuitously" extended benefits even if for retaliatory purposes. *See ante* at 13, 14 (issue stated as "whether, under ERISA § 510, an employer can 'discriminate against an employee [sic] by revoking a gratuitous benefit' "); 17 (holding stated as being "that ERISA § 510 does not prohibit the revocation of gratuitously provided benefits").

Such a narrow interpretation of the intended meaning of the phrase "discriminate against" in application of § 510's anti-retaliation provision is simply wrong. It is not dictated by the statutory text nor by § 510's legislative history and it is wholly at odds with the clear purpose of this and related anti-retaliation provisions.

As the en banc majority concedes, the statutory text is ambiguous on the question whether an employer can "discriminate against" a plan participant or beneficiary in violation of § 510's anti-retaliation provision by revoking "gratuitously"-provided benefits. *Ante* at 13, 14. And, as the court also concedes, § 510's legislative history gives no express guidance on the question. *Ante* at 14. Nor is there any direct circuit interpretive precedent available. We therefore have only the bare text, "discriminate against a participant or beneficiary for exercising any right to which he is entitled under [ERISA or an ERISA plan]" and the general purposes of this and comparable anti-retaliation provisions as that may be revealed in legislative history and judicial interpretations of such comparable provisions.

Though the statutory text is ambiguous on the specific question, two aspects of the full text are critical in assessing the general purpose of § 510's anti-retaliation provision. The first is that the class protected from retaliatory action is that of plan "participants and beneficiaries," a class that is not limited to current employees. The second is that the term "discriminate against" is facially open-ended. As developed in Part II of this opinion, it is not limited to conduct involving disparate treatment. Nor is it otherwise expressly or implicitly qualified or limited by its context. Hence, as written, it appears to signify any form of significant adverse action against a protected person taken for retaliatory purposes.

That this is the intended broad meaning is borne out by the legislative history which indicates that the purpose of § 510's anti-retaliation provision was to prevent employers who maintain ERISA plans from using economic leverage to intimidate participants and beneficiaries under those plans from exercising their ERISA given rights to enforce the plans' terms. *See* S. Rep. No. 93-127, 93d Cong., 2d Sess. (1973), *reprinted* in 1974 U.S. Code Cong. & Admin. News 4838, 4872 (Section 510 was enacted "in the face of evidence that in some plans a

worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions). If what is being prohibited is the use by ERISA-plan employers of any form of economic leverage calculated to chill or prevent exercise of ERISA-given rights, it must be a matter of no consequence that the subject of the leverage might be a benefit that has been "gratuitously" provided. What is prohibited is coercion by economic leverage, and this may as well be effected by conditioning the continuance of a "gratuity" on foregoing the exercise of a protected right as by terminating a presumably otherwise enforceable benefit. Indeed, given the added risk of doing the latter, coercion by the conditioned-carrot method might be the more tempting device, hence one as surely contemplated by the statute.

This interpretation—that prohibited retaliatory discrimination under § 510 may be effected by terminating "gratuitous" benefits—finds support in decisions so interpreting the ADEA's comparable anti-retaliation provision, 29 U.S.C. § 623(d). *See Passer v. American Chemical Society*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (employer's cancellation of special symposium honoring claimant in retaliation for exercising protected right under ADEA actionable under anti-retaliation provision, notwithstanding a "mere gratuity"); *Cohen v. S.U.P.A., Inc.*, 814 F.Supp. 251, 259-61 (N.D.N.Y. 1993) (employer's retaliatory termination of health benefits being gratuitously provided to laid-off employee actionable under ADEA's anti-retaliation provision).

IV

Presumably because of the considerations just discussed, no court, so far as I am aware, has until now held that an employer's retaliatory cutting off of "gratuitously"-provided benefits cannot ever be found a violation of § 510's anti-retaliation provision.

The en banc majority purports to find such decisions in two sources, but both are flatly inapposite.

First, the court relies on two decisions, *NLRB v. Electro Vector*, 539 F.2d 35 (9th Cir. 1976), and *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965), which, construing § 8(a)(3) of the NLRB, have held that an employer's retaliatory withholding of "gifts" does not violate that particular anti-retaliation provision. While, as indicated, it is quite proper to rely on decisions interpreting provisions of § 8(a)(3) that are comparable to those in § 510, *ante* at 15, these decisions do not do that. Section 8(a)(3) expressly limits the retaliatory employer conduct that it prohibits to "discrimination in regard to *hire or tenure of employment or any term or condition of employment*." 29 U.S.C. § 158(a)(3) (emphasis supplied). These decisions are simply, and properly, pointing out that "gifts" (unless they have been regularized to the status of entitlements) are not "conditions of employment," hence not prohibited means of retaliation under § 8(a)(3). But, § 510 contains no such express or implicit limitation or qualification on the kinds of retaliatory discrimination that it prohibits. Nor is its protection limited, as necessarily is that of § 8(a)(3), to employees. These § 8(a)(3) decisions therefore do not speak at all to the issue whether § 510 prohibits the retaliatory revocation of "gifts" or "gratuities" to ERISA-plan participants and beneficiaries.

The other decisions relied upon by the en banc majority, *Haberern*, 24 F.3d 1491, *McGath*, 7 F.3d 665, and *Woolsey*, 934 F.2d 1452, are equally inapposite—for the same general reason. Each, interpreting the discriminate-by-interference-with-attainment-of-benefits prong of § 510, holds that discrimination for *that* prohibited purpose can only be effected by conduct that affects "the employment relationship." None, as indicated, is interpreting the anti-retaliation prong of § 510 whose meaning is here in issue. The attainment-of-benefits prong that they are applying is, by definition, limited to employer conduct that affects *employee* participants and beneficiaries of ERISA plans by preventing their "attainment" of ERISA benefits. As

to that particular prohibition, these decisions are simply making one of two points: that the specific evil at which it was aimed was purposeful manipulation of the employment relationship itself as a way of preventing employees from attaining ERISA benefits, *e.g.*, *Haberern*, 24 F.3d at 1503 ("protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting"), or that it could not be interpreted to apply to plan amendments alone because of an employer's right as settlor to change its terms, *e.g. Woolsey*, 934 F.2d at 1461 (plan alternation alone not actionable even if done by disparate treatment).

Neither of these necessary limitations on conduct that can be considered discrimination under the attainment-of-benefits prong of § 510 has any application to the intended reach of the anti-retaliation provision. The anti-retaliation provision is not concerned only with employees, nor at all with the attainment of benefits; nor can its application in any way interfere, if not limited, with employers' unilateral rights to amend their plans. In consequence, these interfere-with-attainment decisions have nothing to say about whether an employer can discriminate against a plan participant or beneficiary by cutting off "gratuitous" benefits for the exercise of ERISA-given rights.

V

The only other basis for the en banc court's reading of a "gratuitous-benefit" limitation into § 510's anti-retaliation provision is what it considers the adverse public policy consequences of failing to do so. The court asserts that unless "gratuitous" benefits are excepted, benign employers (presumably in significant numbers) will be chilled from private acts of charity, while equally numerous ungrateful plan participants will be able to convert mere charitable gratuities into legal entitlements. *Ante* at 16. Those consequences, says the court, must surely not have been intended by Congress, so that an

intention to avoid them must be read into the statute to give effect to that unexpressed legislative intent.[3]

Laying aside any skepticism one might have about how much of private-charity impulses are actually at any risk in this area, there are firm reasons for rejecting the court's public policy concerns and the related implications of Congressional intent. The first, and most obvious, is that if these twin risks—of widespread frustrations of employer altruism and unjust rewarding or underserving ERISA-plan participants—had seemed as significant to Congress as the court assumes them to be they easily could have been avoided by simple statutory drafting that did not occur. My hunch is that Congress never thought of any such policy concerns or that, if it did, it thought them too negligible to the overall operation of

[3] The court actually goes beyond this and asserts that ERISA somehow reflects an affirmative "public policy of encouraging employers to offer employees gratuitous benefits," a policy which, it says, is supported by its decision but would be thwarted by allowing the termination of such benefits to be the subject of § 510 anti-retaliation claims. *Ante* at 17. There is no support in either ERISA's text or in its legislative history for the proposition that it embodies or reflects any such affirmative public policy. The court cites passages from three opinions of sister circuits as supporting its assertion, *id.*, but none even remotely does so. The statement in *Hamilton*, 945 F.2d at 79 that "[e]mployers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits", expresses no such general policy; it was made in support of a narrow holding that employers can, by appropriate action, reserve such a right. The statement in *Owens*, 984 F.2d at 398, that "[a]bsent contractual obligation, employers may decrease or increase benefits" was made in the course of upholding the right of employers to amend a plan when that right is properly reserved; it intimated nothing about a general policy of encouraging gratuitous benefits. The statement in *Leavitt*, 921 F.2d at 161-62 that "ERISA is concerned with protecting contractual benefits" was made as an aside in the course of holding that a plan participant may voluntarily settle a breach-of-fiduciary claim under ERISA; neither the holding nor the statement intimate anything about a general ERISA policy favoring gratuitous benefits.

ERISA to warrant any attention. Certainly it never mentioned them. The plain fact is that ERISA, on its face, and so far as its legislative history reveals, is simply indifferent to the question whether employers should go beyond the law and engage in private acts of charity to ERISA-plan participants.

Furthermore, to ascribe such weight as the court does to these concerns of possible injustices in individual cases completely misreads the fundamental purpose of this and comparable anti-retaliation provisions. They are not enacted with an eye to the relative moral worth of individual employers and those who inspire them to retaliatory action. Their fundamental purpose is *in terrorem*: to impose a general deterrence upon the impulse of employers to retaliate for the exercise of statutory rights against their perceived interests. Sad though it be as a commentary on human nature, it is a fact of consequence that Congress has found the retaliatory impulse sufficiently widespread and sufficiently a threat to their intended operation that it has considered anti-retaliation provisions necessary to secure the integrity of all the major employment-relations statutory schemes of recent history—the NLRA, Title VII, the ADEA, and ERISA.

To read a gratuitous-benefit limitation into this anti-retaliation provision is flatly at odds with that general deterrent purpose. For that further reason, it is not warranted as a judicial gloss on the statute.

VI

One final point deserves mention. It concerns the precedential effect of the court's statutory interpretation. That interpretation effectively defines the "gratuitous benefit" whose retaliatory revocation is shielded from liability as broadly including any the employer "had no duty" to provide. *Ante* at 19.[4]

[4] That this is the specific meaning of "gratuitous" in the court's interpretation is evident not only from the cited reference, but

Under that interpretation, it would be of no consequence that a particular provision of benefits, though not legally obligatory, was, however, motivated wholly or to a substantial degree by provable economic self-interest rather than pure altruism. A purpose, for example, to retain the services of an employee with skills not replaceable at acceptable relative expense in the market; or a legally counselled effort to avoid possible liability because there might be a contractual obligation later determined not to exist; or a desire, because of troubled employment relations, simply to make a gesture that might return greater economic benefits than those conferred; and so on.

Though it would still, in my view, have been an unwarranted exercise in statutory interpretation, the court would at least have been nearer its professed aim of encouraging (or not discouraging) private charity on the part of employers if it had required a purer variety than simply "not compelled by duty." Tax law, in a not unrelated setting, might have provided a model in its definition of that which constitutes a "gift" for tax purposes. Concerned precisely with the difficulty of discerning raw economic self-interest behind ostensible "gifts" of one sort or another, tax law hit upon "detached and disinterested generosity" as the distinguishing mark of the true "gift." *See Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 246 (1956). Who knows how Stiltner's claim, for example, might have fared under such a definition? Because it clearly fails as a matter of law under the court's doubly-unwise interpretation, we will never know. We do know, however, that in this circuit from now on employers may with impunity retaliate against ERISA-plan participants who exercise statutory rights against their perceived interests by cutting off any benefits being provided them, for whatever

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from its holding that, as a matter of law, the benefits provided Stiltner were "gratuitous" because not contractually or otherwise legally compelled.

reason, just so long as they are not legally enforceable obligations.

VII

Because it is undisputed that Beretta ceased paying Stiltner's insurance premiums in specifically promised retaliation for his exercise of an ERISA-given right to press a claim against Beretta, this constituted discrimination in violation of § 510's anti-retaliation provision as a matter of law. The fact that this did not involve disparate treatment in relation to others, and the fact that Beretta was not legally obligated to pay the premiums are irrelevant to application of § 510's anti-retaliation provision. Accordingly, I would vacate the district court's dismissal of Stiltner's § 510 retaliation claim and remand for award of an appropriate remedy.

I am authorized to state that Chief Judge Ervin, Judge Hall, Judge Murnaghan and Judge Michael join in this concurring and dissenting opinion.

APPENDIX B

[Filed February 27, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1323

STILTNER

v.

BERETTA USA CORP.

CORRECTED MANDATE

The judgment of this Court dated 2/2/96 takes effect today.

BERT M. MONTAGUE
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1323

JAMES E. STILTNER,
Plaintiff-Appellant,

v.

BERETTA U.S.A. CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
J. Frederick Motz, Chief District Judge
(CA-92-3507-JFM)

Argued: June 8, 1994

Decided: January 18, 1995

Before HALL and HAMILTON, Circuit Judges,
and PHILLIPS, Senior Circuit Judge

OPINION

PHILLIPS, Senior Circuit Judge:

This is an action under ERISA and state law, brought by James E. Stiltner against his former employer, Beretta U.S.A. Corp. ("Beretta"), a Maryland arms manufacturer. Stiltner contends that Beretta violated ERISA and state law by refusing to pay him long-term disability benefits and terminating his health insurance benefits in retaliation for his assertion of an ERISA claim for long-term disability benefits. The district court granted summary judgment for Beretta on all counts. We affirm on all counts save one: the count alleging wrongful retaliation under ERISA § 510. On that count, we vacate the summary judgment for Beretta and remand for further proceedings.

I.

In October of 1988, Stiltner was laid off from his job at FN Manufacturing ("FN"), a South Carolina firearms manufacturer. Through his former manager at FN, Frank Valorose, Stiltner managed to obtain a new job at Beretta's plant in Accoheek, Maryland, where Valorose was then working. From November 21, 1988 until March 1, 1989, Stiltner worked for Beretta as a tool room supervisor. During this period, Beretta paid Stiltner as an independent contractor, rather than a regular employee, gave him free housing and an extra allowance to cover the cost of his COBRA coverage under FN's health insurance plan, but did not provide him with any other fringe benefits.

In early 1989, Beretta offered Stiltner a job as a regular employee. On February 28, 1989, Beretta's Human Resources Manager, Peter Axelrod, presented Stiltner with a letter outlining the terms of this offer, including the salary and benefits that Stiltner would receive if he accepted it. Among the benefits listed were the following:

> Medical Insurance: Company paid hospitalization and medical insurance for you and your dependents . . . .

> Long Term Disability: Pays 60% of salary after six months of disability (after one year of employment). Payable to age 70.

JA 83-84. After reviewing the letter with Axelrod, Stiltner accepted the job offer and signed the letter to indicate his assent to its terms. At the same time, Axelrod agreed to make Stiltner's regular employment retroactive to November 21, 1988, for purposes of his eligibility for vacation and benefits.

During the process of assuming his new employment status, Stiltner filled out the forms required to enroll in two welfare benefit plans that Beretta provided for its employees: the Beretta U.S.A. Health Plan # 501 ("the Health Plan"), which provided group health insurance for all full-time employees and their eligible dependents, and the Beretta U.S.A. Life and Disability Plan # 502 ("the Disability Plan"), which provided long-term disability benefits to all full-time employees who became disabled after one year of employment. When Stiltner enrolled in the Disability Plan, coverage under that plan was provided through American Bankers Life Assurance Company ("American Bankers"). The insurance policy that American Bankers issued to the Disability Plan contained an express exclusion of coverage for disabilities caused by pre-existing conditions. The certificate of insurance/benefits booklet that American Bankers issued to participants in the Disability Plan plainly disclosed this pre-existing condition limitation, JA 557, but Stiltner claims that he did not receive a copy of this booklet until after he became disabled. The Summary Plan Description then in effect for the Disability Plan (the "original SPD") did not disclose the pre-existing condition limitation. JA 55-65, 533-43.

In February of 1990, Beretta changed the insurer of its Disability Plan to the Guardian Life Assurance Company of America ("Guardian"). Like the American

Bankers policy, the Guardian policy contained an express pre-existing condition limitation. Guardian issued a new certificate of insurance/benefits booklet for the Plan's participants, which plainly disclosed the pre-existing condition limitation. JA 482, 494. Beretta sent its participating employees copies of this new benefits booklet, along with a memo captioned "Summary Plan Description Supplement to Certificate for the Beretta U.S.A. Health and Welfare Plans" (the "SPD Supplement"), which stated that "[t]his supplement and your certificates of insurance/benefits booklets constitute the Summary Plan Description as required by [ERISA]." JA 566. Stiltner claims, however, that he did not receive a copy of either the new certificate of insurance/benefits booklet or the SPD Supplement until after he became disabled.

On February 6, 1990, Stiltner, who was already suffering from a heart condition when he came to Beretta, had a heart attack. He worked intermittently for the next several months, but stopped work altogether on June 9, 1990, when he suffered another heart episode that required him to be hospitalized for some time. He has not worked for Beretta or anyone else since that date.

While Stiltner was in the hospital in June of 1990, Beretta sent him information on filing a disability insurance claim, including the new Guardian certificate of insurance/benefits booklet, the original SPD for the Disability Plan, and the SPD Supplement for that Plan. Stiltner applied to Guardian for long-term disability benefits under the Disability Plan, and to the Social Security Administration for Social Security disability benefits. Guardian initially denied his claim on the ground that the disability claimed arose out of a pre-existing condition. In an effort to help Stiltner out, Beretta wrote to Guardian urging it to reconsider its decision to deny Beretta's claim for disability benefits and continued to pay Stiltner his full salary for several months after he stopped working, even though it was clear to all con-

cerned that he would never be able to return to work.[1] Though Beretta's Health Plan provided that coverage would normally end when the employee "stop[ped] active work on a full-time basis," Beretta also continued to pay Stiltner's health insurance premiums while his claim for disability benefits was pending before Guardian, pursuant to a provision in its Health Plan that the parties agree gave Beretta the right—if not the obligation—to continue coverage for employees who "cease active work due to illness or injury, lay-off, retirement, or leave of absence."

Two years after Stiltner stopped working, in June of 1992, Guardian notified him that, Beretta's importuning notwithstanding, it had made a final decision to deny his claim for long-term disability benefits. Thereafter, Stiltner, through counsel, wrote to Beretta demanding that it pay him over $330,000 in long-term disability benefits, to which he claimed entitlement under the terms of his employment contract and the Disability Plan, notwithstanding any exclusions contained in the insurance policies that Beretta had purchased for that plan. Beretta refused. At that point, the relationship between Beretta and Stiltner began to sour. Stiltner, through counsel, notified Beretta that he intended to assert an ERISA claim against it for long-term disability benefits under the Disability Plan, and offered to settle that claim for approximately $332,000. Beretta responded with a letter in which it denied that it had any legal obligation to pay Stiltner the disability benefits he sought, but offered to pay him a lump sum of $3,000 and to continue paying his health insurance premiums for another 18 months, if he would agree to release it from all liability arising from his claim for disability benefits. Critically, Beretta's letter also threatened that if Stiltner did not accept its settle-

[1] Beretta stopped these gratuitous salary payments in October of 1990, after Stiltner began to receive Social Security disability benefits.

ment counteroffer by a certain date, Beretta would "terminate all payments, whether for health insurance or for any other cause, on [his] behalf."

Stiltner refused the settlement offer and filed this action against Beretta in federal district court. Stiltner's complaint alleged that he was entitled to recover long-term disability benefits from Beretta both under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (because the original SPD for the Disability Plan did not mention a pre-existing condition exclusion), and under the terms of Beretta's February 28, 1989 offer letter, which he characterized as an employment contract. In a pendent state-law claim, Stiltner also sought actual and punitive damages for mental and emotional distress, alleging that Beretta's conduct in refusing to pay him the disability benefits to which he claimed entitlement and later threatening to cut off his health insurance, benefits if he did not drop his claim for those disability benefits constituted intentional infliction of emotional distress under Maryland law. Finally, he sought injunctive relief against Beretta's threatened termination of his health insurance benefits, alleging that the termination would violate the terms of his employment contract and Beretta's Health Plan, as well as the anti-retaliation provision in § 510 of ERISA, 29 U.S.C. § 1140 (making it unlawful for an employer to "discriminate against" a participant or beneficiary in an ERISA plan "for exercising any right to which he is entitled under the provisions of an employee benefit plan [or ERISA]").

With his complaint, Stiltner also filed an application for a temporary restraining order and preliminary injunction preventing Beretta from cutting off his health insurance benefits, expelling him from its Health Plan, severing his employment relationship, or otherwise retaliating against him for exercising his rights under its Disability Plan and ERISA, pending final determination of his § 510 claim on the merits. The district court denied this motion for preliminary relief, finding that Stiltner was unlikely

to succeed on the merits of his claim that the threatened termination of his health insurance benefits would violate the terms of his employment contract, the terms of the Health Plan, or ERISA § 510. Within hours of the district court's ruling, Beretta made good on its threat and terminated Stiltner's health insurance benefits.[2] Stiltner promptly noticed an appeal from the district court's deniel of his request for preliminary injunctive relief, together with an emergency motion for injunction pending appeal. The district court denied this motion, and this court refused Stiltner's request for a stay pending appeal. The case therefore continued to move toward trial in the district court while the appeal from the denial of preliminary injunctive relief was pending before this court.

After that appeal was argued before this court, but before a decision had been handed down, the district court entered summary judgment for Beretta on all of Stiltner's claims on the merits, and we dismissed as moot the pending appeal from the denial of preliminary injunctive relief. *Stiltner v. Beretta U.S.A. Corp.*, No. 93-1247 (4th Cir. March 28, 1994). Stiltner then filed this second appeal, which challenges the entry of summary judgment against him on each of his claims on the merits.

II.

In Count I of his complaint, Stiltner alleged that he was entitled to recover long-term disability benefits from Beretta under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3),[3] even though his disability was caused by a pre-

[2] Stiltner remains a participant in the Health Plan today, pursuant to a COBRA election, but the company no longer pay his premiums for him, and he lacks the financial ability to continue paying his COBRA premiums for long, much less to pay the premiums for replacement insurance when his COBRA coverage expires.

[3] ERISA § 502(a)(3) permits a participant in an ERISA plan to bring an action for "appropriate equitable relief . . . to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3).

existing condition within the meaning of the exclusion in the Guardian policy, because the pre-existing condition limitation was not mentioned in the original SPD for the Disability Plan. Stiltner bases this claim upon our decisions in *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140-41 (4th Cir. 1993), and *Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992), which he says hold that representations made in a summary plan description control over conflicting statements made in other official plan documents. The district court held that Beretta was entitled to summary judgment on this claim, because Stiltner had failed to come forward with sufficient evidence to permit a reasonable fact-finder to find that he had either relied upon or been prejudiced by the original SPD's failure to mention the pre-existing condition exclusion.

We find no fault in the district court's disposition of this claim. It is certainly true that the original SPD was inconsistent with the other official plan documents, in that it failed to reveal the existence of the pre-existing condition limitation. But, as the district court recognized and Stiltner now concedes, to secure relief under ERISA based on representations in a summary plan description that are inconsistent with provisions of the other official plan documents, an ERISA claimant must demonstrate that he either relied upon or was prejudiced by those representations. *Aiken*, 13 F.3d at 141; *Pierce*, 979 F.2d at 27. As the district court pointed out, the summary judgment record contained undisputed evidence that Stiltner did not see a copy of the original SPD until after he suffered the disability for which he now seeks to recover benefits. JA 286-87.[4] On this record, we agree with the district

[4] In an attempt to overcome this problem, Stiltner contends that he did come forward with evidence that members of Beretta's management team gave him "verbal and written descriptions of the information contained in [the original SPD]" when he first enrolled in the Disability Plan, that those descriptions did not mention a pre-existing condition limitation, and that he relied upon them to his detriment in failing to make other arrangements for long-term disability insurance. Specifically, he points to (i) deposition testimony that Valorose told him, over lunch on the day of his initial interview at Beretta, that the benefit package he would receive at Beretta would be "similar to" the one he had received from his former employer, FN; JA 183, 189-90 (Valorose deposition); JA 226 (Stiltner deposition); and (ii) evidence that Axelrod told him, both in the February 28, 1989 offer letter and in his oral discussions of the terms of that letter, that he would receive long-term disability benefits after one year of employment, without indicating that there was a preexisting condition limitation on those benefits.

As did the district court, we find this evidence to be singularly lacking in probative value. In the first place, we do not think that Stiltner could reasonably have interpreted any of the alleged representations by Valorose or Axelrod as descriptions of the content of the original SPD, since none of them made any reference to that document. In addition, we do not think an ERISA claimant can be said to have "relied" upon an SPD that he has never seen, in the sense required by *Aiken* and *Pierce*, simply because he has relied upon informal oral and written summaries of its contents made to him by the employer's agents. *Cf. Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 60 (4th Cir. 1992) (plan participant not entitled to recover benefits to which she was not entitled under plain language of plan itself, simply because she claimed that plan administrator had made informal oral and written representations to her indicating that she would receive such benefits, where the alleged modifications to the plan were not implemented in conformity with the plan's formal amendment procedure), *cert. denied*, —— U.S. ——, 113 S.Ct. 1051 (1993); *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453-54 (4th Cir. 1992) (Wilkinson, J., concurring).

court that Stiltner failed to carry his burden of coming forward with sufficient evidence to permit a reasonable fact-finder to find that he had relied upon or been prejudiced by the inaccuracy in the original SPD, which is an essential element of his claim for relief under *Aiken* and *Pierce*.[5] We therefore conclude that the district court

[5] In light of this conclusion, we need not address Beretta's alternative argument that Stiltner cannot maintain an *Aiken/Pierce* claim based on the original SPD because it was superseded by the SPD Supplement before he became disabled.

did not err in entering summary judgment for Beretta on Stiltner's claim for disability benefits under ERISA § 502.

III.

In Count II of his complaint, Stiltner alleged that Beretta had breached the terms of its February 28, 1989 offer letter, which he characterized as a contract of employment, by refusing to pay him the disability benefits he sought. Stiltner alleged that because the letter stated that Beretta would provide Stiltner with long-term disability insurance that "pays 60% of salary after six months of disability (after one year of employment)," without mentioning a pre-existing condition limitation, it imposed upon Beretta a legally enforceable obligation to pay him long-term disability benefits if he became disabled after one year of employment, whether or not the disability in question was caused by a pre-existing condition.

The district court held that Beretta was entitled to summary judgment on this claim. The court thought that the claim was probably preempted by ERISA, under *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 298 (4th Cir. 1993), because it "related to" the Beretta Disability Plan. But the court found it unnecessary to decide whether the claim was actually preempted or not. As the court explained, if the claim were preempted, it would fail as a matter of law because it could not be recast as a viable federal claim. The offer letter could not be enforced as an informal ERISA plan, because it did not meet the four requirements for a plan set forth in *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (9th Cir. 1982) (en banc). Similarly, it could not be enforced under a federal common-law breach of contract theory, because no reasonable fact-finder could find that the parties intended it to impose upon Beretta an obligation to pay Stiltner long-term disability benefits above and beyond those provided by the terms of the Disability Plan. JA 14-15. Finally, even if the claim were not preempted, it would

still fail as a matter of law under basic principles of Maryland contract law, for the same reason that it would fail under federal common-law contract principles: because no reasonable fact-finder could find, on the record before it, that the parties had intended the offer letter to impose upon Beretta a corporate obligation to pay Stiltner long-term disability benefits beyond those provided by the Disability Plan that Beretta maintained through its insurer.

Once again, we find no fault with the district court's disposition of this claim. As did the district court, we think it very likely that the claim is preempted by ERISA § 514(a), because it seeks to recover benefits of a sort which are already provided by an ERISA plan, even though it seeks to recover them not from the plan itself, but from the employer directly. *See Biggers*, 4 F.3d at 298; *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295 (5th Cir. 1989). We also agree with the district court that if the state-law breach of contract claim is preempted, it cannot be salvaged by recasting it as a statutory ERISA claim or a federal common-law claim, because it would fail as a matter of law under either theory. The representations about disability benefits made in the offer letter cannot be enforced as an independent ERISA plan, because the letter does not constitute a "plan" under the test set forth in *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (9th Cir. 1982) (en banc), which this Court adopted in *Elmore v. Cone Mills*, 23 F.3d 855, 861 (4th Cir. 1994) (en banc).[6] Nor do the representations about disability benefits made in the offer letter give rise to a viable claim for benefits under the federal common law of contract; as the district court explained at some length, no reasonable fact-finder could possibly find that the parties intended them to impose upon

[6] The offer letter does not meet at least two of the four requirements for an informal plan under *Donovan*: it does not show the source of the funding for the benefits described, and it does not indicate the procedure by which an employee can apply for and receive benefits. *See Cone Mills*, 23 F.3d at 861; *Donovan*, 688 F.2d at 1373.

Beretta an obligation to pay Stiltner long-term disability benefits above and beyond those provided by the terms of the Disability Plan itself. Finally, even if the claim is not preempted, it would still fail as a matter of law under Maryland law, for the same reason that it would fail under federal common-law principles: because no reasonable fact-finder could find that the parties intended the representations made about disability benefits in the offer letter to impose upon Beretta a corporate obligation to pay Stiltner long-term disability benefits beyond those provided by the Disability Plan that Beretta maintained through its insurer.

The district court did not err in entering summary judgment for Beretta on Stiltner's contract claim.

IV.

In Count IV of his complaint, Stiltner alleged that Beretta's conduct in refusing to pay him disability benefits and threatening to cut off his health insurance benefits if he did not drop his claim for disability benefits constituted intentional infliction of emotional distress under Maryland law. The district court held that Beretta was entitled to summary judgment on this claim on two independent, alternative grounds: because it was preempted by ERISA, and because the conduct complained of was not sufficiently "outrageous" to support a claim for intentional infliction of emotional distress under Maryland law. JA 16-17. We agree.

ERISA preempts state-law claims to the extent they "relate to" any ERISA plan. 29 U.S.C. § 1144(a). A state-law claim "relates to" an ERISA plan, hence is preempted, "if it has a connection with or reference to such a plan," *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983), so that state common-law tort and contract actions which are "based on alleged improper processing of a claim for benefits under an employee benefit plan" are preempted by ERISA. *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 48 (1987). Applying this analysis, the

lower federal courts uniformly have held that state-law claims of intentional infliction of emotional distress which are based on the allegedly wrongful denial or termination of benefits under an ERISA plan are preempted by ERISA. *See, e.g., Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482, 487-88 (9th Cir. 1983) (ERISA preempts employee's state-law emotional distress claim based on allegedly wrongful denial of claim for disability benefits under ERISA plan); *Lopez v. Commonwealth Oil Refining Co.*, 833 F. Supp. 86, 89-90 (D. P.R. 1993) (retired employee's state-law emotional distress claim based on allegedly wrongful offsetting of disability benefits by amount of social security income was preempted by ERISA, because it was "directly related to the dispute concerning the [retired employee's rights under] the employee welfare benefit plan"); *Lennon v. Walsh*, 798 F. Supp. 845, 849 (D. Mass. 1992) (plan participant's state-law emotional distress claim based on allegedly wrongful denial of claims for medical and disability benefits under ERISA plan was preempted by ERISA); *Thomas v. Telemecanique, Inc.*, 768 F. Supp. 503, 506 (D. Md. 1991) (discharged employee's state-law emotional distress claim based on allegedly wrongful accusation that she had been defrauding her employer by collecting disability benefits from its ERISA plan to which she was not entitled was preempted by ERISA, because "[t]he issue of whether the alleged conduct was extreme depends upon the parties' rights under the benefit plan"); *Parisi v. Trustees of Hampshire College*, 711 F. Supp. 57, 60-62 (D. Mass. 1989) (discharged employee's state-law emotional distress claim based on allegedly wrongful denial of claim for disability benefits was preempted by ERISA).

Stiltner attempts to distinguish these cases by arguing that his emotional distress claim is not based on allegations that Beretta wrongfully denied or terminated benefits to which he was entitled under its ERISA plans, but on allegations that it wrongfully denied or terminated benefits

to which he was entitled under his employment contract. This argument is without merit. Count IV of Stiltner's complaint asserts a state-law emotional distress claim based on Beretta's conduct in "refusing to pay [him] agreed-upon disability benefits and [in] threatening him with discontinuance of his family health insurance benefits to coerce him into abandoning his disability claim." Complaint ¶ 39. Count IV expressly incorporates by reference paragraphs 1 through 37 of the complaint, *id.* ¶ 38, which in turn assert that Beretta is obligated to pay Stiltner disability benefits under the terms of *both* its Disability Plan and his employment contract. *Id.* ¶¶ 27, 31. For this reason, Stiltner's claim that Beretta acted wrongfully in refusing to pay him the "agreed-upon disability benefits" cannot be resolved without reference to the Disability Plan. This in turn means that the claim "relates to" an ERISA plan within the meaning of ERISA's preemption clause, and is therefore preempted. *See Thomas,* 768 F. Supp. at 506; *Lennon,* 798 F. Supp. at 849; *Parisi,* 711 F. Supp. at 61-62.

Even if Count IV were not preempted, Beretta would still be entitled to summary judgment on it, for the conduct in question is not sufficiently "outrageous," as a matter of law, to support a claim for intentional infliction of emotional distress under Maryland law. In Maryland, the tort of intentional infliction of emotional distress requires proof of "extreme and outrageous" conduct by the defendant, and conduct will be found to rise to that level only if it "go[es] beyond all possible bounds of decency, and [is] to be regarded as atrocious, and utterly intolerable in a civilized community. *Harris v. Jones,* 380 A.2d 611, 614 (Md. App. 1977). Applying this test, the Maryland Court of Appeals has held that conduct very similar to that alleged here—the intentional refusal to pay medical and disability-benefits to which the plaintiff claimed entitlement under an insurance plan—was not sufficiently "outrageous" to give rise to a claim for intentional infliction of emotional distress. *Gallagher v.*

Bituminous Fire & Marine Ins. Co., 492 A.2d 1280, 1284-85 (Md. App. 1985). As the court there noted, while it is "conceivable" that the tort of intentional infliction of emotional distress "might be committed by means of withholding benefits," it will be "the rare case" indeed in which this is so. *Id.* We agree with the district court that this is not such a case. *See Dickson v. Selected Risks Ins. Co.,* 666 F. Supp. 80, 81 (D. Md. 1987) (insurer's refusal to provide coverage under a liability insurance policy "does not approach the level of outrageousness necessary to sustain an intentional infliction of emotional distress claim" under Maryland law); *Barksdale v. St. Clair County Comm'n,* 540 So. 2d 1389, 1391 (Ala. 1989) (employer's termination of health benefits that it had been gratuitously providing to a disabled employee was not sufficiently "outrageous" to give rise to a tort claim for intentional infliction of emotional distress under Alabama law).

The district court did not err in entering summary judgment for Beretta on Stiltner's state tort claim for intentional infliction of emotional distress.

V.

We turn finally to the one issue on which we differ with the district court: whether Beretta was entitled to summary judgment on Stiltner's claim of wrongful retaliation under ERISA § 510. That section, captioned "Interference with protected rights," makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against" a participant or beneficiary in an ERISA plan "for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . [or] . . . [ERISA Title I]," or "for the purpose of interfering with the attainment of any right to which [he] may become entitled under the plan." 29 U.S.C. § 1140.[7]

[7] **ERISA § 510 reads, in pertinent part:**

Interference with protected rights. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or

As we have recognized, the *primary* purpose of § 510 was to prevent employers from discharging their employees—either actually or constructively—in order to prevent their pension rights from vesting. *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991). But that was not the only purpose of § 510: it was also designed to prevent employers from using economic sanctions or other forms of reprisal to discourage employees from exercising their rights under ERISA and plans subject to it. *See* S. Rep. No. 93-127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4872 (section 510 was enacted "in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals"); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.Code Cong. & Admin. News 5038, 5110.[8] We have held that § 510 must be broadly interpreted to effectuate these twin purposes. *Conkwright*, 933 F.2d at 236-38.

By its terms, section 510 therefore provides plan participants and beneficiaries two separate types of protection, vindicable by civil action, against employer "interference" with ERISA rights. First, it protects them against discharge or other adverse employment action designed to

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> discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter [ERISA Title I], section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140.

[8] A companion provision, ERISA § 511, makes it a criminal offense to use fraud, force, or violence (or the threat thereof) to interfere with or prevent the exercise of rights protected by ERISA. 29 U.S.C. § 1141.

block the vesting of their rights under an ERISA plan. *See Conkwright*, 933 F.2d at 237. Second, it guarantees them "the right to claim plan benefits without interference or fear of reprisal." J. Jorden, W. Pflepsen, & S. Goldberg, *Handbook on ERISA Litigation*, § 8.01[A], at 8-3 (1992); *see Conkwright*, 933 F.2d at 236 (section 510 prohibits "discharge or other discriminatory conduct toward participants and beneficiaries which is designed . . . to discourage the exercise of *any rights* afforded by [ERISA]") (emphasis in original) (internal quotations omitted).

While most claims under § 510 invoke its first guarantee, it is the second—commonly referred to as the "anti-retaliation" provision—that is solely at issue in this case.

This is a point that bears critical emphasis, for whether a claim is made under the anti-retaliation provision or the "interference-with-attainment" provision of § 510 makes a great difference in several respects critical to decision in this case. Specifically, it makes a difference as to the conduct that can constitute "discrimination" for either purpose; as to whether the challenged conduct must affect the employment relationship; and as to whether the conduct must affect only contractually enforceable rights of the claimant. These are distinctions with important consequences which Beretta, the district court, and the dissent have failed in various ways to recognize or properly to apply in their analysis of the specific § 510 claim made in this case.[9] Because we will be differentiating between

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[9] The most critical indication of the dissent's failure to recognize or appreciate the distinction is its reliance on a number of decisions which have rejected § 510 claims alleging violations of the primary right, on the grounds that the conduct did not affect the "employment relationship." Slip op. 42, citing *West v. Butler*, 621 F.2d 240 (6th Cir. 1980); *Haberern v. Kaupp Vascular Surgeons Pension Plan*, 24 F.3d 1491 (3d Cir. 1994); *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452 (10th Cir. 1991); *Deeming v. American Standard, Inc.*, 905 F.2d 1124 (7th Cir. 1990). The dissent fails

the two throughout our analysis, we will refer to them for convenience as the "retaliation claim" and the "primary claim" respectively. We begin by pointing out wherein

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to note that none of the claims in these cases alleges that the conduct challenged was taken in reprisal for the claimant's attempted exercise of an ERISA or plan-created right. *See West*, 621 F.2d at 242 (secondary picketing which diminished value of pension and welfare benefits); *Haberern*, 24 F.2d at 1495 (amendment to defined benefit plan which eliminated life insurance coverage); *McGath*, 7 F.3d at 667 (amendments to plan which blocked claimant's eligibility); *Woolsey*, 934 F.2d at 1454-56 (refusal to give benefit to retired plan beneficiary in preferred form); *Deeming*, 905 F.2d at 1126 (elimination of favorable retirement provision).

The position taken in all these cases is that generally taken by courts about the scope of § 510's primary right: that it is intended to protect only against conduct affecting employment relationships that is undertaken for the specific purpose of preventing the realization of rights under an ERISA plan, and not against alterations in the plan itself. *See, e.g., West*, 621 F.2d at 245 ("§ 510 designed *primarily* to protect the employment relationship that *gives rise* to . . . pension rights") (emphasis added). A prevesting discharge from employment (either actual or, possibly, constructive, *see West*, 621 F.2d at 245) is of course the classic example of a clear violation of this primary right. The cited cases relied upon by the dissent all involve efforts to base claims of violation of this right on conduct which, though it does not directly alter the employment relationship, "discriminates" in a way that intentionally prevents the attainment of plan benefits. In uniformly rejecting the efforts, these courts are simply holding to the traditional view that the specific and only evil against which the § 510 primary right guards are alterations, by whatever means, of the employment relationship itself, as a means of blocking the attainment of expected benefits. *See West*, 621 F.2d at 245 (to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights"); *Haberern*, 24 F.3d at 1503 (" 'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting' ") (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 1990)); *McGath*, 7 F.3d at 670 (§ 510's protection can't extend to plan amendments alone because as settlor of the plan, employer has right to change terms); *Woolsey*, 934 F.2d at 1461 (plan alteration alone not actionable even if done by disparate treatment); *Deeming*, 905 F.2d at 1127 (protection of primary right can not be extended to partial plan terminations

Stiltner's § 510 claim is unmistakably a retaliation claim and not a primary claim: a claim that in reprisal for the exercise of rights under ERISA and an ERISA plan. Beretta took discriminatory action against him; not that Beretta took discriminatory action against him for the purpose of preventing his attainment of some potential benefit under the plan.

Stiltner's claim is that if Beretta made good on its threat to cut off his benefits under its Health Plan because he refused to accept its proposed settlement of his claim for benefits under its Disability Plan, it would be "discriminating" against him for exercising his rights under the Disability Plan and ERISA, in violation of § 510's anti-retaliation provision. It is undisputed that the Disability Plan is an "employee benefit plan" within the meaning of § 510, that Stiltner is a participant in it, and that ERISA gives him the right to enforce the terms of that plan against Beretta. There also is no real doubt that Beretta's termination of Stiltner's health benefits—both as threatened and as ultimately carried out—was substantially motivated by a specific intent to interfere with his exercise of his rights under the Disability Plan and ERISA: [10] Beretta's November 23, 1992 letter to Stiltner

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since they are expressly authorized by law; discriminatory modifications of plan prohibited by another ERISA provision, § 204(G); § 510's primary right therefore protects only against actions affecting employment relationship whose effect is to prevent attainment of benefits).

These cases, therefore, say nothing about the nature of the secondary, anti-retaliation right which is being asserted in our case. Specifically, none purports, or could purport, to hold that the anti-retaliation right under § 510 extends only to conduct that "affects the employment relationship." To cite them for that proposition is therefore simply wrong. As we have earlier noted, the class of persons expressly protected by § 510 is "participants and beneficiaries," not just "employees," though the protected class may obviously include the latter.

[10] As do all § 510 claims, *Conkwright*, 933 F.2d at 238-39, a claim under the anti-retaliation provision requires proof that the challenged conduct was motivated by a specific intent to interfere

flatly stated that its threat to terminate Stiltner's health benefits was made for the express purpose of coercing him into abandoning his ERISA claim for benefits under the Disability Plan, and Beretta does not suggest that it had any other motive. The validity of Stiltner's § 510 claim, then, turns on whether termination of his health benefits can constitute unlawful "discrimination" against him within the meaning of the anti-retaliation provision of § 510.

The district court held that it could not. The court reasoned that "discrimination" under § 510 requires a showing that the plaintiff has been treated less favorably than other similarly situated individuals, and that Stiltner could not do this, because there was no evidence that Beretta was gratuitously extending health benefits to any other employees who had stopped active work on a full-time basis. As the court explained:

> [D]iscrimination implies comparing the plaintiff to somebody else, and there is nobody else that plaintiff can be properly compared to in this case, other than himself, because he is the only one to whom Beretta is gratuitously extending health care benefits . . . . [S]o there is simply not any discrimination against the plaintiff . . . within the meaning of 510.

Stiltner contends that the district court's interpretation of "discrimination" in § 510's anti-retaliation provision is an unduly narrow, hence incorrect, one. We agree.

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with the participant's rights under ERISA. *See Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 53 (1990). The plaintiff need not show that such an impermissible intent was the *sole* reason for the challenged action, so long as it was a substantial or "motivating" factor. *See Conkwright*, 933 F.2d at 238; *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992); *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991); *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988); *Gavilik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *Titsch v. Reliance Group Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd mem.*, 742 F.2d 1441 (2d Cir. 1983).

(1)

Neither the text nor the legislative history of ERISA provides an explicit definition of what it means to "discriminate against" a plan participant or beneficiary for purposes of either provision of § 510. The legislative history of § 510 does indicate, however, that it was patterned on § 8(a)(3) of the National Labor Relations Act (NLRA). *See* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (Comm. Print 1976), at 1774-75 (remarks of Senator Hartke) ("[Section 510's] language parallels section 8(a)(3) of the National Labor Relations Act."). For this reason, a number of courts have looked to the § 8(a)(3) precedents in interpreting § 510. *See, e.g., West v. Butler*, 621 F.2d 240, 245 & nn. 4-5 (6th Cir. 1980); *Newton v. Van Otterloo*, 756 F. Supp. 1121, 1135-37 (N.D. Ill. 1991). We think the analogy an appropriate one.

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to encourage or discourage membership in any labor organization "by *discrimination* in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. § 158(a)(3) (emphasis added). It is well-established that the concept of "discrimination" under this section is not limited to disparate treatment of similarly situated employees, but includes any adverse action taken against one or more employees *because of* their decision to engage in protected activities. F. Bartosic & R. Hartley, *Labor Relations Law in the Private Sector* 114 (2d ed. 1986); *see Midstate Telephone Corp. v. N.L.R.B.*, 706 F.2d 401, 406 (2d Cir. 1983) (any action taken against an employee that "attache[s] a penalty to [protected] activity" is "discriminatory" within the meaning of § 8(a)(3)); *N.L.R.B. v. Borden, Inc.*, 600 F.2d 313, 320 (1st Cir. 1979);

N.L.R.B. v. Jemco, Inc., 465 F.2d 1148, 1152 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). The "discrimination" lies not in the fact that the employer is treating the employee less favorably than other similarly situated employees, but in the fact that it is treating him less favorably than it would have treated *him* had he not engaged in the protected activity. *See Jemco*, 465 F.2d at 1152 ("[The] discrimination . . . lies in the employment benefit [being] afforded to [the employee] prior to [his] engaging in a [protected] activity," but "denied to [him] after [he] engaged in such an activity."). That the employer has not taken the same adverse action against other similarly situated employees who have not engaged in the protected activity is of course persuasive *evidence* that it is treating this particular employee differently than it would have treated him had he not engaged in that activity, hence that it is improperly "discriminating against him within the meaning of the statute, but it is not an essential prerequisite for a finding of such discrimination. *See Borden*, 600 F.2d at 320. As the Sixth Circuit has explained, a contrary holding "would lead to the somewhat absurd result that an employer could never be found in violation of [section 8(a)(3)] so long as he was careful to treat all [similarly situated] employees alike, no matter how destructive of employee rights his conduct may be." *Jemco*, 465 F.2d at 1152.

We think the concept of "discrimination" developed in the NLRA § 8(a)(3) cases is equally applicable in the context of the anti-retaliation provision in ERISA §510. Like NLRA § 8(a)(3), that provision is not designed to require employers to treat all similarly situated employees alike, but simply to prevent employers from using economic leverage to discourage certain activity that Congress wanted to protect. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("[Section 510] does not broadly forbid all forms of discrimination" in employment benefits, only discrimination "designed to retaliate for the exercise of a right or to interfere with

the attainment of an entitled right."). It therefore makes perfect sense to hold that an employer may "discriminate against" an employee within the meaning of the anti-retaliation provision of § 510 even in the absence of evidence that it has treated him less favorably than other similarly situated individuals, so long as it is clear that it has treated him less favorably than it would have had he not attempted to engage in the protected activity of exercising his ERISA rights.[11]

This interpretation of the term "discriminate" in § 510's anti-retaliation clause is also fully consistent with the established interpretation of the same term in similar anti-retaliation provisions in other federal employment statutes. Both Title VII and the Age Discrimination in Employment Act contain provisions which make it unlawful for an employer to retaliate against individuals for attempt-

[11] Of course, evidence of such disparate treatment will, as a practical matter, often be critical to the success of a § 510 retaliation claim. Plaintiff will seldom have any *direct* evidence that the adverse action taken against him was motivated by an impermissible intent to retaliate against him for exercising his rights under ERISA. *See Conkwright*, 933 F.2d at 239 (noting that § 510 plaintiffs "confront[] proof problems similar to those encountered by Title VII plaintiffs," because "employers rarely, if ever, memorialize their specific intent to act unlawfully"). In the absence of direct proof of impermissible motive, he may rely on the framework for indirect proof of intent developed in *McDonnell Douglas* and other Title VII cases. *Cf. Conkwright*, 933 F.2d at 239 (approving use of *McDonnell Douglas* proof scheme for claims invoking § 510's guarantee against conduct designed to interfere with the attainment of rights under an ERISA plan); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) (approving use of *McDonnell Douglas* proof scheme for claims invoking analogous anti-retaliation provision in Title VII). Under that familiar framework, proof that the employer has treated the plaintiff differently than other similarly situated individuals who did not attempt to exercise rights protected by ERISA may be important both in making out a prima facie case of impermissible retaliation and in establishing that the employer's proffered nonretaliatory reasons are pretextual. But a finding of "discrimination" under § 510 does not, in and of itself, require a showing of such disparate treatment. *Cf. Borden*, 600 F.2d at 320.

ing to enforce those statutes against it.[12] Like § 510, both of these provisions forbid employers to "discriminate against" individuals for engaging in certain protected activity, but do not define the phrase "discriminate against." Both are consistently interpreted, however, to forbid an employer to take *any kind* of adverse action [13]

[12] *See* 42 U.S.C. § 2000e-3(a) (making it unlawful for employer "to *discriminate against* any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII] . . . or . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]") (emphasis added); 29 U.S.C. § 623(d) (making it unlawful for employer "to *discriminate against* any of his employees . . . because such individual . . . has opposed any practice made unlawful by [the ADEA] . . . or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]") (emphasis added).

[13] The dissent's suggestion, slip op. 59 & n.5, that by reading "discrimination" to encompass "*any kind* of adverse action" taken for retaliatory purposes, we open the door to claims based on no more than trivial personal affronts, misses the point. In the context used, the phrase is simply saying that the kind of adverse action that can constitute "discrimination" violative of § 510's *anti-retaliation provision* is not confined to that which affects the employment relationship (as is that which alone can violate § 510's primary right, *see* note 9 *supra*). It speaks to kind, not degree, in making the obvious point that *any form* of adverse action may act as effectively chilling reprisal for exercise of "ERISA rights," hence violate the anti-retaliation provision. If protection is ever needed against such horribles as that suggested by the dissent's humorous "bologna-for-filet-mignon" quip, it easily can be found in traditional *de minimis* applications of the key word "adverse" with its obvious implication of something truly harmful. Surely the adverse action in the instant case—the termination of valuable Health Plan benefits—does not fall in such such trivial affront, *de minimis*, category. And in this connection, it should, with all respect, be noted that a careful account of the ceremonial event cancellation found "discriminatory" in the *Passer* ADEA case upon which we rely by analogy, slip op. 21-22, would reveal it not as the trivial matter depicted by the dissent's summary, slip op. 43-44, but as action having substantial adverse professional and economic effect upon the claimant in that case.

against an individual because he has engaged in the protected activity, even in the absence of evidence that it has treated him less favorably than other similarly situated individuals. *See, e.g., Passer v. American Chem. Soc.*, 935 F.2d 322, 331-32 (D.C. Cir. 1991) (employer's cancellation of special symposium in employee's honor could constitute actionable "discrimination" under ADEA's anti-retaliation clause, when done with specific intent to retaliate against him for asserting age discrimination claim against it); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) (any "adverse employment action"). Because the anti-retaliation provision at issue here uses the same "discriminate against" language as those other provisions, and was enacted after them, we assume that Congress intended it to have the same basic meaning. *See Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989) (looking to case law under Title VII's anti-retaliation provision for guidance in interpreting § 510's anti-retaliation provision), *cert. denied*, 111 S.Ct. 53 (1990). *See generally Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979) (when Congress passes statute containing language that is the same as or similar to language in an existing statute, it is presumed to adopt the existing judicial interpretation of that language).

We therefore hold that the concept of "discrimination" under the anti-retaliation provision of § 510 is not limited to disparate treatment of similarly situated individuals, as the district court held, but also includes any adverse action taken against a plan participant or beneficiary that is motivated by a specific intent to retaliate against him for exercising his rights under ERISA or some plan covered by it.

(2)

Beretta argues next that even if a claim of unlawful "discrimination" under § 510 does not require a showing of disparate treatment of similarly situated individuals,

Stiltner cannot prevail on his § 510 claim because the alleged act of retaliation did not substantially affect "on-going employment relations" between the parties. Beretta maintains that § 510 only protects employees against acts of retaliation that substantially interfere with on-going employment relations, and that its termination of Stiltner's health benefits cannot be said to do this, because it occurred *after* his employment relationship with it had "all but ceased" and it was understood by all concerned that he would never return to work. For this reason, Beretta contends, the district court's ultimate conclusion that Stiltner cannot prevail on his § 510 claim was correct, even if its rationale was not.

We disagree with the central premise of Beretta's argument here: that § 510 prohibits only acts of retaliation that substantially interfere with on-going employment relations between the parties. Unlike NLRA § 8(a)(3), which is, by its own terms, explicitly limited to "discrimination *in regard to hire or tenure of employment or any term or condition of employment*," 29 U.S.C. § 158 (a)(3) (emphasis added), ERISA § 510 contains no such limitation on its face. Nor does its plain language extend protection only to a class of individuals with whom the employer is currently engaged in on-going employment relations, as do the anti-retaliation provisions of Title VII and the ADEA, which literally forbid employers to discriminate against "employees" and "applicants for employment" only. *See* 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA). Instead, ERISA's anti-retaliation provision broadly forbids an employer to engage in *any* form of "discrimination" against "participants" and "beneficiaries" in ERISA plans, 29 U.S.C. § 1140, a group that is defined by statute to include many individuals who are not currently engaged in on-going employment relations with the employer, such as former employees who are drawing benefits under ERISA pension or disability plans and family members of employees who are covered by ERISA health plans. *See* 29 U.S.C.

§ 1002(7) (defining "participant" to include both employees and former employees); *id.* § 1002(8) (defining "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder"). To read this anti-retaliation provision as applying only to acts of retaliation that substantially interfere with on-going employment relations between the parties—a limitation that finds no support in its plain language—would be to make its protection unavailable, as a practical matter, to a large number of the participants and beneficiaries it was designed to protect. Absent more compelling evidence that Congress did in fact intend such an incongruous result, we decline to read into the statute a limitation that does not appear on its face and would obviously undermine its purpose. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' "); *Union Bank v. Wolas*, 502 U.S. 151, 534, (1991) (Scalia, J., concurring) (the courts are bound to give statutory language its plain meaning absent a " 'scrivener's error' producing an absurd result"); *see also Conkwright*, 933 F.2d at 236-38 (section 510 must be liberally interpreted to effectuate ERISA's broad remedial purposes).

We therefore hold that the anti-retaliation provision of § 510 applies to *any* conduct by an employer that has an adverse impact on a participant or beneficiary in an ERISA plan and is motivated by a desire to punish that person for exercising his rights under ERISA, whether or not it substantially interferes with ongoing employment relations between the parties. The act of retaliation alleged here—the termination of critical health benefits—clearly satisfies this test.[14]

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[14] For this reason, we need not decide whether Stiltner was still technically "employed" by Beretta at the time of the alleged retaliation.

(3)

Beretta argues finally that Stiltner cannot prevail on his § 510 claim because an employer's decision to terminate benefits which it is not legally obligated to provide in the first place can never be actionable under § 510. The argument is that because § 510 is designed to prevent employers from discharging or discriminating against plan participants or beneficiaries in order to interfere with their "attainment" of benefits to which they are or may become "entitled" under an ERISA plan, this purpose is not implicated when the employer withdraws a benefit that it has no obligation to provide the participant or beneficiary—either now or at some point in the future—under the terms of some ERISA plan. Because Stiltner has conceded, for purposes of this appeal, that Beretta was not required by the terms of its Health Plan to continue providing him with health benefits after he stopped working full-time, its decision to terminate those benefits —even in retaliation for his effort to enforce the terms of its Disability Plan against it—thus cannot be actionable under § 510. A contrary ruling, Beretta suggests, would mean that § 510 anomalously gives any participant or beneficiary who asserts a claim for benefits under an ERISA plan an "entitlement" to continue receiving any *other* benefits that the employer is gratuitously providing for as long as that ERISA claim is pending.

As we earlier anticipated, this argument completely misconceives the nature and purpose of the particular type of § 510 claim involved here. Risking redundancy, we must again point out that Stiltner's claim is not made under the prong of § 510 that makes it unlawful for an employer to discharge or otherwise discriminate against a participant or beneficiary in an ERISA plan "for the purpose of interfering with the *attainment* of any right to which [he] may become entitled *under the plan*." 29

U.S.C. § 1140 (emphasis added). Instead, it is a claim under the anti-retaliation provision of § 510 that makes it unlawful for an employer, *inter alia*, to discriminate against a participant or beneficiary "for *exercising* any right to which he is entitled *under the provisions of . . . [ERISA Title I]*." *Id.* (emphasis added)[16] The legislative history of ERISA indicates that this provision of § 510 was designed to prevent employers who maintain ERISA plans for their employees from using the economic leverage—particularly the special economic leverage they possess by virtue of their status as the participants' current or former employer—to intimidate those participants and their beneficiaries into not exercising their ERISA-given rights to enforce the terms of those plans. *See* S. Rep. No. 93-127, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.Code Cong. & Admin. News 4838, 4872 (section 510 was enacted "in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions"). Obviously, an employer's threat to terminate *other* employment benefits upon which an employee who is participating in an ERISA plan has come to rely—particularly critical health benefits—can have a coercive effect on his decision whether to exercise his

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[16] Stiltner claims that Beretta has "discriminated against" him by cutting off his benefits under its *Health* Plan in order to retaliate against him for exercising his ERISA-given right to enforce the terms of its *Disability* Plan against it. That Stiltner is "entitled" under Title I of ERISA to maintain an action against Beretta for benefits allegedly due him under the Disability Plan cannot seriously be doubted. The Disability Plan is an employee welfare benefit plan within the meaning of ERISA; Stiltner is a participant in it within the meaning of 29 U.S.C. § 1002(7); and ERISA specifically gives participants in employee welfare benefit plans governed by ERISA the right to bring a civil action against the employer to recover benefits due them under the terms of the plan. *See* 29 U.S.C. § 1132(a)(1)(B).

statutory right to enforce the terms of the ERISA plan, just as can the threat to terminate his employment altogether. That the employer has no *contractual* obligation to continue to provide the benefits that it is threatening to terminate does not reduce the coercive effect that their threatened termination has on his decision whether to pursue his ERISA claim. That being the case, we see no reason why it should matter in application of the anti-retaliation provision that the particular benefits whose termination is alleged to violate § 510 are themselves ones that the employer is not required to provide by the terms of any ERISA plan (though the § 510 plaintiff must of course be able to show that the termination of those benefits is causally related to his decision to engage in the protected activity of asserting his rights under ERISA).

The point is well-illustrated by considering how § 510's anti-retaliation provision works in a retaliatory discharge situation. There is no question but that § 510's anti-retaliation provision forbids an employer to discharge an employee in order to punish him for exercising his right to enforce the terms of an ERISA plan: the literal language of the statute says this, and Beretta concedes as much. An employee who can prove that he has been (or is about to be) discharged for such a legally impermissible purpose can obtain equitable relief against the discharge—an injunction against it if it has not yet occurred; reinstatement and back pay if it has—under § 510 and its remedial provision, § 502(a)(3).[16] *See, e.g., Spinelli v. Gaughan*, 12 F.3d 853, 857 (9th Cir. 1993). *See generally* J. Jorden, W. Pflepsen, & S. Goldberg, *Handbook on ERISA Litigation*, § 8.03[C] (1992). This

[16] ERISA § 502(a)(3) authorizes a participant or beneficiary in an ERISA plan to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] . . . or (B) to obtain other appropriate equitable relief . . . to redress such violations . . . or to enforce any of the provisions of this subchapter." 29 U.S.C. § 1132(a)(3).

is true even if the employee is an at-will employee and thus has no *contractual* right to continued employment. *See Richards v. General Motors Corp.*, 991 F.2d 1227, 1233-34 (6th Cir. 1993) (reversing summary judgment for employer on former employee's claim of retaliatory discharge under ERISA § 510, despite finding that plaintiff had been employed on an at-will basis). This does not mean that § 510 gives the employee an absolute entitlement to continued employment that he would not otherwise have: the employer remains free to terminate him for any reason *other* than the one declared unlawful by § 510, or for no reason at all; it just cannot terminate him for the particular reason forbidden by the anti-retaliation provision of § 510: to punish him for exercising his rights under ERISA.

We think the same reasoning compels the conclusion that an employer's termination of benefits which a plan participant or beneficiary (who may also be an employee) is then receiving, but which he has no *contractual* right to continue receiving in the future, can violate § 510 when it is motivated by a specific intent to retaliate against the claimant for exercising his rights under ERISA. Like termination of at-will employment, the termination of gratuitously provided benefits can have a coercive effect on a plan beneficiary's decision whether to exercise his rights under ERISA. If he can show that the employer is terminating those gratuitously provided benefits with the specific intent to retaliate against him for exercising his rights under ERISA, he ought to be able to obtain equitable relief against their termination under § 510, just as the at-will employee can obtain equitable relief against his discharge when it is done for the same legally impermissible purpose.

We can find no persuasive authority to support Beretta's argument that Congress intended § 510's anti-retaliation clause to apply only to forms of economic coercion that are already actionable under some other provision of the

law (such as the discharge of an employee in breach of the terms of his employment contract, or the termination of benefits to which the employee has a legally enforceable right under the terms of an ERISA plan). The cases upon which Beretta places principal reliance for this position do not support it. None deals with whether the withholding of gratuitously provided benefits can violate the *anti-retaliation* provisions of § 510 and comparable statutes.[17] Indeed, several courts have held that the retaliatory termination of benefits that are being provided gratuitously *can* be actionable under the ADEA's anti-retaliation provision, which, as we have noted, is somewhat narrower than that in ERISA § 510. *See Passer v. American Chemical Soc.*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (rejecting employer's argument that its decision to cancel special symposium it had scheduled in honor of retiring employee, even if done in retaliation for his filing of age discriminaton charges aganst it, was not actionable under ADEA's anti-retaliation clause because it was nothing but "the inconsequential withdrawal of a mere 'gratuity' "); *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 259-61 (N.D.N.Y. 1993) (employer's termination of health bene-

[17] For example, *NLRB v. Electro Vector*, on which the dissent relies, slip op. 37-38, held that an employer does not "discriminate" against an employee within the meaning of § 8(a)(3) of the NLRA when it denies him a bonus that it is not contractually obligated to pay him, unless that bonus is one that has been paid so regularly over such a long period of time that it has become part of the employee's anticipated compensation. 539 F.2d at 37. But the Ninth Circuit's decision was specifically grounded on the fact that § 8(a)(3)'s prohibition against "discrimination" is explicitly limited to discrimination with respect to the "terms or conditions of employment." *See id.* at 36-38 (explaining that bonus can be considered a "term or condition of employment" only when it has been paid for so long that it has assumed the status of a "wage"). Because the ban on unlawful "discrimination" in ERISA § 510 is not limited to discrimination in the terms or conditions of employment, but applies generally to any adverse action taken against a plan participant or beneficiary, *see supra* pp. 22-25, *Electro Vector* provides no support for Beretta's position here.

fits that it was gratuitously providing to a laid-off employee was actionable under ADEA's anti-retaliation provision, where employee made colorable allegation that employer would not have terminated those benefits had he not filed an age discrimination charge against it). Finally, if we were to accept Beretta's argment here, § 510's anti-retaliation provision would have little value to ERISA claimants, for it would do nothing but duplicate other legal remedies already available to them (e.g., an action for breach of an employment contract, or an action for denial of benefits under an ERISA plan). We cannot believe that Congress intended such a consequence.

The interpretation of § 510's anti-retaliation provision that we apply today will not, as Beretta argues and the district court apparently feared, mean that an employer can never withdraw or alter a welfare benefit plan while an employee who is a participant or beneficiary in that plan is asserting an ERISA claim against it for unrelated benefits. To prevail on this type of § 510 claim, a plaintiff must prove that the adverse action in question—here, the curtailment of benefits—was taken with the specific intent to retaliate for the exercise of rights under ERISA. *Conkwright*, 933 F.2d at 238-39. As discussed earlier, in most such cases, the plaintiff will have no direct evidence that the adverse action taken against him was motivated by an impermissible intent to retaliate against him for exercising his ERISA rights, and will therefore be forced to rely on the *McDonnell Douglas* framework for indirect proof of intent.[18] *See supra* n. 11. Under that familiar scheme, the plaintiff's proof of the elements of a prima facie case gives rise to a presumption of improper retaliation, which the defendant can rebut by articulating some legitimate, nondiscriminatory reason for the adverse action; if the defendant does this, the plaintiff must then

[18] This case is a bit of an aberration in this regard, since Stiltner has a "smoking gun" letter from his employer specifically stating that its reason for terminating his health benefits is its desire to discourage him from pursuing his ERISA claim for disability benefits. Such direct evidence of illegal intent is rarely available.

convince the court that the proffered reason was not a "real" reason for the adverse action, but merely a pretext for impermissible discrimination. In cases where an employer alters or withdraws a welfare plan in a way that has an adverse impact on an ERISA claimant, but does so for a legitimate, non-retaliatory reason, it should have no difficulty avoiding § 510 liability by convincing the trier of fact that its decision was motivated by that legitimate reason, rather than by a desire to retaliate for the exercise of ERISA rights. *See, e.g., McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991) (affirming summary judgment for employer on claim that its decision to amend its health insurance plan to limit the benefits payable for AIDS-related claims, which was announced *after* plaintiff-employee began to submit claims for AIDS-related expenses under the plan, was impermissible retaliation under § 510, where employee failed to offer any evidence to rebut employer's assertion that decision was motivated by a legitimate desire to avoid the expense of paying for AIDS-related treatment, rather than by a specific intent to retaliate against him for exercising his ERISA rights), *cert. denied*, —— U.S. ——, 113 S.Ct. 482 (1992). Given the difficulty that employees typically have in prevailing on discrimination claims once the employer has articulated such a legitimate reason for its decision, we are satisfied that our interpretation of § 510 will not have any such generally draconian effect as Beretta asserts and the district court seemed to fear.

Nor is our holding here intended to suggest that ERISA § 510 prevents an employer from offering to provide an employee with some additional benefit that it is not already providing him in order to induce him to release actual or potential ERISA claims against it. *Compare Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 163 (8th Cir. 1990) (not impermissible to condition offer to pay otherwise gratuitous severance benefits to terminated employee upon his agreement to waive ERISA claims). But that is not what happened here. Beretta

made a deliberate decision to continue providing Stiltner health benefits gratuitously after he stopped working full-time—a decision that it communicated to Stiltner on numerous occasions.[19] For nearly three years after Stiltner stopped working full-time—from February of 1990 until November of 1992—Beretta gave no indication that it intended to terminate his health benefits at any time. It was not until November of 1992, some three weeks after Stiltner notified Beretta that he intended to invoke his ERISA-given right to enforce the terms of the Disability Plan against it, and in direct response to that notification, that Beretta first threatened to terminate Stiltner's health benefits. Under these circumstances, Beretta's action cannot reasonably be viewed as a legitimate offer to settle an ERISA claim.[20]

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[19] Though Stiltner ceased active work on a full-time basis in February of 1990 and did not work at all after June of 1990, Beretta continued to carry him and his wife on its Health Plan until March of 1993, pursuant to a provision of the Plan that gave it discretion to continue coverage for employees who have "ceased active work due to illness or injury, lay-off, retirement, or leave of absence." Between February of 1990 and November of 1993, Beretta gave no indication that it intended to terminate Stiltner's health insurance benefits. Indeed, in July of 1992, Beretta sent Stiltner a standard re-enrollment notice advising him that he and his wife were being automatically re-enrolled in the Health Plan at the same level of coverage effective August 1, 1992, and that this coverage would remain in effect until August 1, 1993, unless the plan was modified before then. JA 71. In October of 1992, when Beretta changed the terms of its Health Plan to require participants who wanted family coverage to make certain weekly co-payments, it sent Stiltner a letter notifying him of the change and advising him that if he wanted to retain his family coverage he would have to start making these co-payments beginning December 1, 1992. JA 72. The letter specifically recognized that Stiltner was enrolled in the Health Plan as an "inactive employee[] . . . on leave of absence." *Id.* Beretta later acknowledged that Stiltner had been re-enrolled in the modified plan with family coverage by cashing his co-payment checks. JA 73-74.

[20] The district court's interpretation of § 510 was also based in part on its belief that an interpretation of § 510 that would pre-

(4)

In summary, we hold that the concept of "discrimination" under the anti-retaliation provision of ERISA § 510 is not limited to disparate treatment of similarly situated individuals, as the district court held, but also includes any adverse action taken against a plan participant or beneficiary that is motivated by a specific intent to retaliate against him for exercising his rights under ERISA or some plan covered by it. We further hold that the retaliatory action in question need not substantially affect on-going employment relations between the parties, and that the termination of existing benefits that the employer has no contractual obligation to continue providing can be actionable under § 510, when it is substantially motivated by an improper intent to retaliate, rather than by legitimate business considerations.

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vent Beretta from terminating benefits that it had gratuitously provided to Stiltner during his time of need would "discourage employers from acting in good faith, responsively and generously, to extend health care benefits when they are not required to in the first instance," which would in turn undermine the "public policy favor[ing] the extension of health care benefits," a policy it thought was at least implicit in ERISA.

We disagree with this. As indicated earlier, ERISA is not designed to require employers to provide its employees with any set level of welfare benefits, but simply to accord certain protections to those benefits which the employer voluntarily elects to provide. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). Section 510 of ERISA is designed specifically to prevent employers from using economic leverage—like the threat to discharge or to terminate critical employment benefits—to coerce employees into giving up their right to claim benefits under ERISA plans. When Congress enacted § 510, it necessarily made a policy judgment that the need to protect employees from any fear of interference or reprisal from their employers if they asserted claims for benefits under ERISA outweighed any concerns that the existence of such protection would result in the provision of fewer benefits. The district court was not at liberty to disregard the balance of competing policy interests struck by Congress simply because it thought a different balance would better serve the common good.

In holding to the contrary on each of these points and on that basis granting summary judgment to Beretta, the district court therefore erred. We must accordingly vacate that portion of the district court's judgment and remand the § 510 claim for further proceedings in accordance with this opinion. In remanding, we express no opinion on the proper measure of damages recoverable under the § 510 claim if Beretta's liability on it were to be established, the issue not having been reached and addressed in the district court, nor briefed on this appeal.[21]

VI

We affirm all portions of the district court judgment save that dismissing Stiltner's claim under ERISA § 510; we vacate that portion of the judgment and remand the § 510 claim for further proceedings.

SO ORDERED

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[21] We do observe that there apparently is a division of authority on the damages issue in the lower federal courts that have addressed it and that this court has not had the occasion to do so. *See* J. Jordan, W. Pflepsen, & S. Goldberg, *Handbook on ERISA Litigation*, § 8.03(C) (1992).

HAMILTON, Circuit Judge, concurring in part and dissenting in part:

Baseball manager Leo "the Lip" Durocher once admonished his players: "nice guys finish last." Today, in Part V of its opinion, the majority sends the same message to employers by punishing a company which offered gratuitous benefits to an employee in need and withdrew them only after that employee threatened to sue for an additional $330,000. The majority's interpretation of ERISA § 510 is not supported by the language or the legislative history of that section, and furthermore promotes an undesirable policy by discouraging employers from providing gratuitous benefits. Therefore, I respectfully dissent from Part V of the majority's opinion and that part of Part VI vacating the summary judgment in favor of Beretta on Stiltner's ERISA § 510 claim and remanding it for further proceedings; I join the remainder of the opinion.

I

When James Stiltner became a salaried employee for Beretta on February 27, 1989, he became entitled to "company paid hospitalization and medical insurance." (J.A. 69). The provisions of the employee health care plan, for which Beretta paid, specifically provided that "[y]our coverage will end on the date of the first of these events: 1. The end of the month in which you stop active work on a full-time basis in an eligible class . . . ." (J.A. 138). Following the list of other conditions upon which coverage ceased, a parenthetical clause added the following: "If you cease active work due to illness or injury, lay-off, retirement, or leave of absence, ask your employer if coverage may continue." *Id.*[1]

[1] The majority's statement that this parenthetical gave Beretta "the right—if not the obligation—to continue coverage for employees who 'cease active work due to illness or injury, lay-off, retirement, or leave of absence,' " is, perhaps inadvertently, very misleading. *Ante* at 4-5. Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), upon an employee's "termination . . . or reduction of hours of . . . employment," employers must offer that employee an option to continue coverage under the health care plan. 29 U.S.C.A. §§ 1161, 1163(2) (West 1985 & Supp. 1994). However, under COBRA, if the employee elects to continue coverage under the health care plan, he, rather than the employer, must pay the necessary premiums. Thus, although this parenthetical may have referenced Beretta's obligation to *offer* continued coverage for Stiltner when he ceased actively working for the company, it by no means imposed any obligation on Beretta to *continue to pay* the insurance premiums on behalf of Stiltner.

By June 1990, Stiltner became disabled from heart disease and discontinued active work on a full-time basis with Beretta. However, Beretta benevolently continued paying Stiltner a salary until October 1990. Thus, under the express terms of Beretta's health care plan, Stiltner's entitlement to continued coverage under the plan at Beretta's expense ended in June 1990 when he totally stopped working, or at least in October 1990, when Beretta stopped paying him a salary. Nevertheless, for almost three years, Beretta gratuitously continued to pay Stiltner's health insurance premiums under its health care plan while Stiltner sought long-term disability benefits from an insurer. The record contains no evidence that Beretta ever promised to continue providing these benefits to Stiltner for a specific period of time, or that it ever provided such benefits gratuitously to other employees.

After the insurer denied Stiltner's application for long-term disability benefits, Stiltner demanded that Beretta pay him over $330,000 in long-term disability benefits. Three weeks later, Beretta responded by offering to pay Stiltner $3,000 and to continue paying Stiltner's health insurance premiums for an additional eighteen months. Beretta added that if Stiltner refused to accept this settlement, it would cease paying any further health insurance premiums on Stiltner's behalf.[2]

[2] Beretta did not withdraw the gratuitously furnished health care benefits until March 1993.

Stiltner then filed suit, asserting, among other things, that Beretta's threat to stop paying his health insurance premiums violated ERISA § 510. Stiltner requested the district court to preliminarily enjoin Beretta from terminating these payments pending resolution of his ERISA § 510 claim.

The district court denied Stiltner's request for a mandatory preliminary injunction, reasoning that Stiltner had a minimal chance of succeeding on the merits of his § 510 claim because he "was no longer entitled to health care benefits [and Beretta] . . . is not seeking to do anything than that which it was perfectly entitled to do long ago . . . ." (*Stiltner v. Beretta U.S.A. Corp.*, 93-1247, J.A. 208-09). The district court added that even though the balance of harms "probably weighs in favor of [Stiltner] . . . the public interest seriously weighs in favor of Beretta [because] to grant [Stiltner's] motion in this case would discourage employers from acting in good faith, responsively and generously, to extend health care benefits when they are not required to in the first instance." (*Stiltner v. Beretta U.S.A. Corp.*, 93-1247, J.A. 211-12).

Stiltner appealed the district court's denial of his request for preliminary relief. While his appeal was pending before this court, the district court granted summary judgment in favor of Beretta on all of Stiltner's claims, including the ERISA § 510 claim. We, therefore, *sua sponte* dismissed Stiltner's appeal involving the denial of his request for a preliminary injunction. Stiltner now appeals the district court's grant of summary judgment in favor of Beretta.

II

My disagreement with the majority centers on a narrow issue with far-reaching ramifications. Specifically, in validating Stiltner's ERISA § 510 claim, the majority interprets that statute to preclude an employer from revoking *any* benefit if the employer intended to retaliate

against an employee for the employee's exercise of ERISA rights, regardless of whether the employer had provided that benefit gratuitously. I would not read ERISA § 510 so broadly. Instead, I believe ERISA § 510 does not preclude an employer from withholding gifts, *i.e.*, gratuitously provided benevolent benefits, regardless of the employer's motive, except when those benefits constitute part of the employment package, *i.e.*, benefits that amount to a term or condition of an ongoing employment relationship.

A

Section 510 reads in pertinent part:

> *Interference with protected rights.* It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or *discriminate* against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter [ERISA, Title I], section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C.A. § 1140 (West 1985) (emphasis added). As the majority correctly notes, "[n]either the text nor the legislative history of ERISA provides an explicit definition of what it means to 'discriminate against' a plan participant or beneficiary for purposes of either provision of § 510," and thus the phrase "discriminate against" is ambiguous. *Ante* at 18. Accordingly, we may refer to the legislative history of ERISA § 510 to define the phrase "discriminate against." *See Ratzlaf v. United States*, 114 S. Ct. 655, 662-63 & n.18 (1994).

The courts interpreting the legislative history of ERISA § 510 make clear, as does the legislative history itself,

that ERISA § 510 "is modeled upon § 8(a)(3) of the National Labor Relations Act." *Young v. Standard Oil*, 660 F. Supp. 587, 597 (S.D. Ind. 1987), *aff'd.*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988). *See also* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor, the Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (Comm. Print 1976), at 1774-75 (statement of Sen. Hartke) (hereinafter cited as Legislative History) ("The language [of ERISA § 510] parallels section 8(a)(3) of the National Labor Relations Act and should do the trick."); *West v. Butler*, 621 F.2d 240, 245 n.4 (6th Cir. 1980) ("Senator Hartke's reference to § 8(a)(3) of the National Labor Relations Act is revealing [because] [t]hat section . . . makes it an unfair labor practice for an employer to discriminate 'in regard to hire or tenure of employment or any term or condition of employment.' ").[3]

Courts frequently recognize that "[i]ncorporation of identical *or similar* language from an act with a related purpose evidences some intention to use it in a similar vein." *See Doe v. DiGenova*, 779 F.2d 74, 83 (D.C. Cir. 1985) (emphasis added). *See also Stribling v. United States*, 419 F.2d 1351, 1352-53 (8th Cir. 1969) (express language and legislative construction of another statute employing similar language and applying to similar persons may control by analogy); 2B George Sutherland, *Statutes and Statutory Construction* § 53.03, at 233 (5th ed. 1992) ("[B]y transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court . . . is able to give effect to the probable intent of the legislature . . . .").

Under § 8(a)(3) of the National Labor Relations Act (NLRA), an employer's revocation of a particular benefit

[3] Even Stiltner acknowledges that Congress modeled ERISA § 510 after the NLRA.

does not equate with unlawful discrimination *unless* that benefit qualifies as a "term or condition of employment." Because gratuitously provided benefits are terminable at will, the revocation of such benefits does not support a finding of discrimination under the NLRA *regardless* of the employer's motivation for revocation. *See, e.g., NLRB v. Electro Vector*, 539 F.2d 35, 37 (9th Cir. 1976) ("[A] bonus which is considered a gift can be withheld by the employer *at will* . . . .") (emphasis added), *cert. denied*, 434 U.S. 821 (1977); *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 212 (8th Cir. 1965) ("The rule is that gifts per se . . . are not terms and conditions of employment, and an employer can make or decline to make such payments as he pleases . . . ."); *NLRB v. Electric Steam Radiator Corp.*, 321 F.2d 733, 737 (6th Cir. 1963) (same).

If NLRA § 8(a)(3) protects only the withholding of gratuitously provided benefits which amount to "terms and conditions of employment," and Congress modeled ERISA § 510 after the NLRA, it follows *a fortiori* that Congress intended ERISA § 510 to be likewise limited in scope. Such a view is in accord with several courts that have addressed this issue. *See Newton v. Van Otterloo*, 756 F. Supp. 1121, 1136 (N.D. Ind. 1991) (ERISA § 510 "does not reach retaliatory action that affects neither the terms nor conditions of employment nor rights under the plan."). *See also Butler*, 621 F.2d at 246 (unless actions "affect an employee's working conditions []or procure his dismissal, they do not pose the threat Congress sought to address when it enacted § 510."). This interpretation is eminently reasonable, because even though ERISA § 510 does not specifically refer to "terms or conditions of employment," neither the plain wording of the statute nor its legislative history contains any compelling evidence that Congress intended ERISA § 510 to extend *beyond* the protection offered by the NLRA. The plain wording of ERISA § 510 prohibits an employer

from "discriminat[ing]" against employees for exercising their ERISA rights. The legislative history behind ERISA § 510 reveals that Congress intended this provision to prevent the "[d]iscipline and discrimination [which] can be so unpleasant as to amount to constructive discharge . . . . That can be the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure." Legislative History at 1774-75 (statement of Sen. Hartke). Consequently, from the foregoing, we can extrapolate the following principle: ERISA § 510 does not prevent an employer from revoking gratuitously provided benefits unless those benefits amount to a term or condition of an ongoing employment relationship.

Thus, in determining whether an employer "discriminated" under ERISA § 510 by improperly revoking a particular benefit, I would require a court to assess first whether the benefit at issue amounted to a term or condition of an ongoing employment relationship, or was merely a gratuitously provided benefit. As noted above, only when the withheld gratuitously provided benefit amounts to a term or condition of an ongoing employment relationship can an employer "discriminate against" an employee under ERISA § 510.

Generally, a particular benefit qualifies as a "term or condition of employment" when it is "so tied to the remuneration which employees receive[] for their work that [it is] in fact a part of it." *See Litton Microwave Cooking Prods. v. NLRB*, 949 F.2d 249, 252 (8th Cir. 1991) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965)), *cert. denied*, 112 S. Ct. 1669 (1992). Stated another way, the benefit must be "of a fixed nature and ha[ve] been paid over a sufficient period of time to have become a part of the employees' anticipated remuneration." *Electro Vector, Inc.*, 539 F.2d at 37. Factors suggesting that a benefit amounts to a "term or condition of employment" include: the regularity and consistency with which the employer provided the benefit;

the existence of a formal policy that determines eligibility for the benefit; and pre-employment reference to the benefit as an inducement to future employees. *See Litton Microwave Cooking Prods.*, 949 F.2d at 252; *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 503 (5th Cir. 1964). Factors indicating that the benefit is merely gratuitous include: the lack of consistency or regularity with which it is given; the lack of uniformity in or basis for the amount of the benefit; the lack of an official program under which the benefits are provided, *i.e.*, the benefits are provided entirely at the employer's discretion; and the fact that the benefit is not tied to the remuneration received by the employee. *See Electro Vector*, 539 F.2d at 37; *Wonder State*, 344 F.2d at 214. Even this court has implied that "a one-time gift or expression of appreciation from management" would not amount to a protected "condition of employment." *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991).

Accordingly, to establish discrimination under ERISA § 510 in the present case, Stiltner must establish that Beretta's *gratuitous* payment of health insurance premiums *after* he ceased working actively for Beretta amounted to a "term or condition of employment." Applying the factors previously listed leads to the inescapable conclusion that these benefits amounted to no more than a gift and were, therefore, revocable at will. For example, Beretta did not have a regular or continuous practice of gratuitously paying such premiums. Indeed, the record reflects that Beretta had never before paid health insurance premiums gratuitously to any other employee. Similarly, Beretta had no formal policy indicating how or when it would gratuitously offer these benefits, instead providing them purely at its discretion. Finally, these benefits bore no relation to Stiltner's remuneration or continued employment.

Had Beretta gratuitously paid health insurance premiums for other employees on other occasions, or even

orally promised Stiltner that it would continue providing these benefits for a certain duration, it might be argued that the benefits constituted a "term or condition" of Stiltner's employment. Under such circumstances, there would be some basis to conclude that the benefits "bec[a]me a part of [Stiltner's] anticipated remuneration." *Electro Vector* 539 F.2d at 37. However, because Beretta gratuitously paid health insurance premiums only for Stiltner and gave him no reasonable basis to believe such payments would continue for any particular period of time, these benefits can only be classified as a gift.[4] In summary, because the benefits at issue amounted to no more than a gift, the revocation of those benefits cannot amount to "discrimination" under ERISA § 510, *regardless* of Beretta's motive.

B

The majority offers two reasons why we should interpret ERISA § 510 more broadly than NLRA § 8(a)(3): (1) unlike NLRA § 8(a)(3), ERISA § 510 fails to refer specifically to "terms or conditions of employment," and (2) Congress could not have intended such an interpretation because it only duplicates remedies available under other areas of the law, *e.g.*, remedies for breach of an employment contract. In my view, these

[4] As the majority notes, Beretta gratuitously paid Stiltner's health insurance premiums for almost three years, without any indication that it intended to terminate those benefits. In 1992, Beretta re-enrolled Stiltner in its employee health care plan. Coverage under the plan was to remain in effect until August 1, 1993. Beretta also sent Stiltner a letter indicating that he was re-enrolled in the health care plan as an "inactive employee[] on leave of absence." (J.A. 72). Normally, these facts would create a genuine issue of material fact as to whether the gratuitous payment of health insurance premiums amounted to a term or condition of Stiltner's employment. However, in the present case, Stiltner *conceded* that Beretta had no obligation to continue paying his health insurance premiums. Thus, these facts do not affect the appropriate analysis.

arguments do not compel an interpretation of ERISA § 510 which is more expansive than the scope of NLRA § 8(a)(3).

As to the former argument, as noted earlier, ERISA § 510's failure specifically to incorporate "terms and conditions of employment" protection offered by NLRA § 8(a)(3) to include gratuitous benefits. This is especially true because the legislative history contains *no* suggestion that when Congress enacted ERISA § 510 it intended to expand the range of proscribed conduct beyond that enumerated in NLRA § 8(a)(3). Indeed, the legislative history states otherwise; it reveals that Congress intended this provision to prevent the "[d]iscipline and discrimination [which] can be so unpleasant as to amount to constructive discharge . . . . That can be the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure." Legislative History at 1774-75 (statement of Sen. Hartke). As to the latter argument, if this interpretation only duplicates remedies from other areas of the law, then the majority fails to explain why Congress enacted NLRA § 8(a)(3), which also protects only the terms or conditions of employment. In other words, I fail to understand how Congress could have intended NLRA § 8(a)(3) to protect only the terms or conditions of employment, but could not have intended a similar interpretation for ERISA § 510. Thus, absent some compelling indication that Congress intended ERISA § 510 to extend beyond the protection offered by NLRA § 8(a)(3), I would interpret these statutes similarly. Accordingly, ERISA § 510 does not prohibit an employer from withholding gifts, *i.e.*, gratuitously provided beneolent benefits, regardless of the employer's motive, except when those benefits constitute part of the employment package, *i.e.*, benefits that amount to a term or condition of an ongoing employment relationship.

For much the same reasons, I cannot accept the majority's conclusion that an employer may violate ERISA

§ 510 even when the retaliatory conduct does not "substantially interfere with on-going employment relations between the parties." *Ante* at 23. Numerous courts, recognizing that ERISA § 510 only protects the terms and conditions of employment, have also held that the protection offered by this statute extends only to those situations where an employer's action "affect[s] the individual's *employment relationship in a substantial way.*" *Butler*, 621 F.2d at 245-46 (emphasis added); *see also Haberern v. Kaupp Vascular Surgeons Pension Plan*, 24 F.3d 1491, 1503 (3rd Cir. 1994) (term "discriminate" in ERISA § 510 "should be limited to action affecting the employer-employee relationship"); *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 667-69 (7th Cir. 1993) (interpreting ERISA § 510 to only encompass discrimination in the employment relationship); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991) (employer's acts must affect "employment situation" to create a cognizable claim under ERISA § 510); *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) (ERISA § 510 "was designed to protect the employment relationship which gives rise to an individual's pension rights."). Thus, ERISA § 510 only prohibits the revocation of gratuitously provided benevolent benefits when those benefits amount to a term or condition of an ongoing employment relationship.

The majority rejects the persuasivenes of these cases based on what it considers a "critical" distinction between the relationship claim under ERISA § 510 and the primary right claim. *Ante* at 14-17 & n.9. The majority posits that the phrase "discriminate against" in ERISA § 510 carries two definitions, one referring to the primary right claim and one to the retaliation claim. With all due respect, one definition of the phrase "discriminate against" is not only preferable and appropriate but enough. The majority does not cite any authority, nor could it, for its proposition; and, as noted earlier, the legislative history of ERISA § 510 surrounding the

term "discriminate against" denotes a very limited scope. Neither does the majority offer any material reason why an employer's revocation of gratuitous benefits does not constitute discrimination for a primary right claim but does for a retaliation claim. As noted earlier, Congress' use of the phrase "discriminate against" in ERISA § 510 was modeled after NLRA § 8(a)(3), and that phrase, absent some indication of Congressional intent, does not prevent an employer from revoking gifts.

My interpretation by no means suggests that once an employment relationship ends an employer may freely revoke non-gratuitous benefits, *i.e.*, benefits originally offered as a term or condition of employment. Protection from such action results from 29 U.S.C.A. § 1132(a)(1)(B) (West 1985 & Supp. 1994), which empowers any participant or beneficiary in a benefit plan to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan."

Furthermore, unreasonable consequences flow from the majority's interpretation of ERISA § 510. For example, under the majority's holding an employer's decision to cancel a public event in an employee's honor qualifies as improper retaliation under ERISA § 510. *Ante* at 21-22 (citing *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331-32 (D.C. Cir. 1991)).[5] It is incredulous to conclude that Congress intended ERISA § 510 to prohibit the revocation of such trivial items, especially given the fact that ERISA § 510 parallels NLRA § 8(a)(3). *See, e.g., Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 916 (2d Cir.), *cert. denied*, 459 U.S.

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[5] Consistent with the majority's interpretation that ERISA § 510 prevents *any* retaliatory action, the employer in *Passer* would also apparently violate ERISA § 510 if it changed the menu for the event from filet mignon to bologna sandwiches in response to an employee's lawsuit seeking ERISA benefits.

1039 (1982) ("It strains credulity to believe that the reach of [ERISA § 510] extends so far as to include a failure to invite a participant or beneficiary of a plan under ERISA to an employer sponsored social event."); *Newton*, 756 F. Supp. at 1137 (removal of employee from a committee in retaliation for ERISA lawsuit did not violate ERISA § 510 because it "wrought no change in his employment rights, his pay, his shift, his hours, his working conditions, or his rights under the plan.").

Finally, I note that my interpretation of ERISA § 510 better serves the public policy of encouraging employers to offer gratuitous benefits. The result reached by the majority does the opposite. Specifically, by creating a daunting possibility that employers might be compelled to continue providing gratuitous benefits for an indefinite duration, the majority encourages employers to turn a cold shoulder to the special needs of particular employees. *See Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 79 (3d Cir. 1991) ("Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits."), *cert. denied*, 112 S. Ct. 1479 (1992).

The majority believes that public policy favors its interpretation because "[w]hen Congress enacted § 510, it necessarily made a policy judgment that the need to protect employees from any fear of interference or reprisal from their employers if they asserted claims for benefits under ERISA outweighed any concerns that the existence of such protection would result in fewer benefits." *Ante* at n.20. While I do not disagree with this evaluation of Congress' policy judgment, I beleive it only applies *once* the employer elects to provide certain benefits as a *term or condition of employment*. It has no application when the benefits are merely gratuitous. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("[a]bsent contractual obligation, employer may increase or decrease benefits."); *Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990) ("ERISA is

concerned with protecting *contractual* benefits.") (emphasis added). In other words, in enacting ERISA § 510, Congress determined that once an employer elects to include certain benefits within its employment package, it cannot revoke them with the intent to deter employees from asserting their rights under ERISA. However, this policy has no application when the benefits at issue are not "terms or conditions" of the employment package. As previously stated, a contrary interpretation would only work to the detriment of employees.

III

Ultimately, the majority opinion in this case punishes a very benevolent employer. An employer that paid an employee's health insurance premiums when it was clearly and unquestionably under no affirmative duty to do so, and revoked them only after the employee threatened to sue for an additional $330,000. That Congress intended to punish such an employer under ERISA § 510 is nothing short of startling. Because I would affirm the judgment of the district court in toto, I dissent from Part V of the majority's opinion and that part of Part VI vacating the summary judgment in favor of Beretta on Stiltner's ERISA § 510 claim and remanding it for further proceedings; and join the remainder of the opinion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM92-3507

JAMES E. STILTNER,

Plaintiff,

v.

BERETTA U.S.A. CORP.,

Defendant.

TRANSCRIPT OF HEARING FOR MOTION FOR PRELIMINARY INJUNCTION BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT COURT JUDGE

March 1, 1993

* * * *

[3] PROCEEDINGS

(Call to order of the Court.)

THE CLERK: All rise. The U.S. District Court for the District of Maryland is now in session, the Honorable J. Frederick Motz presiding. Please be seated.

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE CLERK: Before the Court is Civil Case Number JFM-92-3507, James E. Stiltner versus Beretta U.S.A. Corp. This matter is now before the Court on a motion hearing.

* * * *

[34] THE COURT: All right. We're here on a motion for preliminary injunction, essentially to require the defendant to continue to provide health benefits to the plaintiff. The plaintiff's motion for a preliminary injunction is denied.

I am fully satisfied that the plaintiff has not demonstrated any entitlement to continued health benefits. The plaintiff was and remains, at least as of this moment, to be employed by Beretta. Sometime in the past, and frankly I don't remember when it was, it really doesn't matter, the plaintiff became disabled. And at sometime in the past, it's conceded by the plaintiff, was no longer entitled to be covered under the terms of the plan to have health benefits provided. It is undisputed the defendant gratuitously did, in fact, extend those health benefits recognizing the plaintiff was in difficult straits at the time.

The plaintiff has also, and it doesn't really matter when, at all relevant times has been asserting another claim under ERISA for long-term disability payments. And one of the letters which was marked this morning, as Court's Exhibit 1, was a demand for payment of them. Upon receipt of that, the defendant said, look, we want to settle this thing. We'll settle the dispute with you. But if you [35] continue to press this claim, which is an ERISA claim, we're not going to continue to pay the health benefits anymore.

Since that has happened, this action was filed, and there have been delays in the holding of this hearing for various reasons, but, essentially, the defendant has continued to make the payments up to this date.

But essentially on those facts, it's the plaintiff's claim that since the defendant stopped paying the health benefits "in retaliation" for the assertion of the long-term disability claim under ERISA, its action was unlawful under Section 510 of ERISA, which is 29 U.S.C., Section 1140. The claim is not frivolous on its face, one could say. This does look like retaliatory action despite the fact that the payments have been made gratuitously.

However, upon analysis of the language of the statute and the purposes of the statute, I am persuaded that the plaintiff's claim is without merit. Under the section, Section 510, it is unlawful for an employer to "discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising rights under ERISA." As we've established during a colloquy with counsel this morning, the only one of these words which is relevant here is "discriminate" because the plaintiff has not been discharged, fined, suspended, expelled or disciplined. So although this is called a retaliation of statute, it is—[36] the language is something narrower than that. In focusing specifically on this case we have to find discrimination.

Now, the plaintiff says, well, the class you should look to to determine discrimination to say that the plaintiff was treated differently than other employees were other participants in the plan. And since they're not—since their health benefits aren't being terminated and mine are, I'm being discriminated against. Well, it doesn't seem to me that that is the appropriate way to define the other persons, the class of persons to whom the plaintiff is to be compared. That class of persons should be other employees of Beretta to whom, i.e., the defendant, to whom health benefit plans are being gratuitously extended. And if you do that, there is no discrimination because the record is unestablished that there is no one else to whom the defendant is now or in the past, with the single exception not relevant here, has extended gratuitous payments. So that the act of canceling or of terminating the health benefits here is not discriminating against the plaintiff in any way compared to what I believe the appropriate comparable class is.

Now, why do I think it's an appropriate comparable class? I think then one does look at the facts of the case, at the circumstances which have given rise to it, and the purposes of ERISA. These people gratuitously extended [37] health benefits because the plaintiff was

in a difficult time. They did the right thing. The plaintiff now seeks to penalize them for that. That's a simple answer to it. He's asserted a big claim under ERISA, which may or may not have merit. I don't know whether it does or not; I haven't looked at it. But he's asserted a big claim, and they basically say, look, you assert that kind of claim against us which we think is meritless, we're not going to continue to extend payments to you. We don't have to do it.

Now, is that retaliation? Well, maybe in under a broad sense it is, but, again, focus upon the purposes of ERISA and the particular circumstances of this case. The whole act was voluntary. It was generous. It was gratuitous. It was also consonant with the general purposes of ERISA which is to extend health benefits. God knows in this country that's one of the crises we now are facing is that people need health benefits extended to them. Beretta went out of its way to extend health benefits to the plaintiff during a period of need. They are now having that used against them because of the interpretation of the statute which the plaintiff is putting upon them. I find that interpretation to be wholly at odds with the general purpose of ERISA or one of its general purposes, which is to provide for the extension of benefits. And so it is that which informs me in defining the class against whom the [38] plaintiff is to be compared for the discrimination language of Section 510, other persons to whom payments were being gratuitously extended.

If, in fact, Beretta had been extending other payments gratuitously to other pepole, and they did have a pattern of practice of that, a different case would be presented. Indeed, that was the plaintiff's original theory in this case expressed in the original demand letter, expressed in the complaint, and in the original motion papers. But that is not the case. We now have uncontradicted affidavit testimony that that is not the case. And it is not the case

before me. The case before me does not, in my judgment, entitle the plaintiff to continued benefits.

* * * *

[42] THE CLERK: Please rise. This Honorable Court now stands in recess.

(Whereupon, the proceedings concluded at 12:10 p.m.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-92-3507

JAMES STILTNER

v.

BERETTA, U.S.A.

ORDER

For the reasons stated on the record today, it is, this 1st day of March, 1993

ORDERED that plaintiff's motion for preliminary injunction is denied.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

[Filed Mar. 2, 1993]

APPENDIX F

STATUTORY PROVISIONS

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tend the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *